797 S.W.2d 536 printed in FULL format.

RUSSELL STRUNK and DEAN MOORE, Individually and as officers, Agents, and Representatives of a Class Consisting of the Membership of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION NO. 753, Plaintiffs-Appellants, v. JOSEPH L. HAHN, REBECCA G. JAMES, PATSY NORTHCUTT, NANCY FOX, ROSE GAMBON, BARBARA JOHNSON, SHARON SUE TRUITT, and FRAN ALBRIGHT, Defendants-Respondents

No. 16305

Court of Appeals of Missouri, Southern District, Division Two

797 S.W.2d 536; 1990 Mo. App. LEXIS 1271; 136 L.R.R.M. 2185

August 20, 1990, Filed

SUBSEQUENT HISTORY: [**1]

Rehearing Denied September 18, 1990, See Attached Addendum.

PRIOR HISTORY:

Appeal from the Circuit Court of Greene County; Honorable Thomas K. McGuire, Jr., Judge.

DISPOSITION: AFFIRMED

CORE TERMS: hired, monthly, service charge, summary judgment, bargaining unit, regular, membership, bargaining, declaration, charter, amended petition, declaratory judgment, service fees, public body, service fee, ordinance, cause of action, Public Sector Labor Law, lawsuit, conditions of employment, public sector, negotiations, abandoned, appendix, join, union membership, initiation, owed, wages, joined

COUNSEL: Douglas W. Greene, III, Montgomery, Twibell, Upp & Greene of Springfield, Missouri, James G. Walsh, Jr., Jolley, Walsh, Hager & Gordon of Kansas City, Missouri, plaintiffs-appellants.

Donald W. Jones, Hulston, Jones & Sullivan of Springfield, Missouri, John C. Scully, Rossie D. Alston, Jr., National Right to Work Legal, Defense Foundation of Springfield, Missouri, for defendants-respondents.

JUDGES: Kenneth W. Shrum, Judge. Hogan, C.J., concurs, and Flanigan, P.J., concurs.

OPINIONBY: SHRUM

OPINION: [*538]

Appellant (hereafter Union) n1 brought this action against respondents seeking to recover from each respondent a monthly service charge n2 equal to the regular monthly dues of union members. Respondents are employees of a public body; namely, the Board of Public Utilities of the City of Springfield (herein called Board of Utilities). The Union is the certified bargaining representative of all Office Unit and all Physical Unit employees of the Board of Utilities. Respondents are not members of the Union [**2] but are employed in the two bargaining units represented by Local2 753. n3 Summary judgment motions were filed by the Union and by respondents. The trial court sustained respondents' summary judgment motion, overruled the Union's summary judgment motion and pursuant to Rule 74.01(b), n4 ruled the judgment to be final and appealable. The Union appeals from that judgment. This court affirms.

n1 Appellant is an unincorporated labor organization, Local Union No. 753, International Brotherhood of Electrical Workers, AFL-CIO.

n2 The terms "service charge," "service fee," and "agency fee" have been used interchangeably in appellants' pleadings and briefs, as well as in the parts of the Joint Statement of Intent before this court. This court will consider them one and the same as appellants have done.

n3 The two bargaining units were the Physical Unit and the Office Unit.

n4 References to rules and statutes are to Rules of Civil Procedure (20th ed. 1989) and RSMo 1986, except where otherwise indicated.

[**3]

No specific reason was assigned by the trial court for its decision. n5 In this court tried case, the primary concern of the appellate court is the correctness of the result that is reached. *Randel v. McClanahan, 760 S.W.2d 607, 608 (Mo.App. 1988).* This court is to sustain the judgment if the result reached was correct on any tenable basis. *Broadstreets, Inc. v. Shippee, 695 S.W.2d 521, 522 [*539] (Mo.App. 1985); David v. Shippy, 684 S.W.2d 586, 587 (Mo.App. 1985).*

n5 The trial court's order reads, in part: "[T]he Court has found that the summary judgment motion filed by defendants should be sustained and the summary judgment motion filed by plaintiffs should be overruled. . . . IT IS HEREBY ORDERED . . . Pursuant to Rule 74.04(b), the motions by defendants for summary judgment dismissing the petitions herein, is hereby sustained."

Initially, the Union filed a lawsuit naming Pat C. Cepowski and Joseph L. Hahn as defendants in Greene County Circuit Court case number CV186-401-CC4. n6 A second [**4] lawsuit was filed and given case number CV186-750-CC2 naming employees in the Office Unit as defendants. The two cases were consolidated on December 11, 1986. A first amended petition filed May 11, 1987, contains a caption which continued to name Cepowski and Hahn as defendants. n7 A reading of the first amended petition reveals no allegations directed toward defendants Cepowski and Hahn. The prayer for relief in the first amended petition seeks no relief against them. As such, the petition fails to state a cause of action against Cepowski and Hahn. To commence a lawsuit (or to continue a lawsuit against parties initially named), requires the filing of a petition. Rule 55.01. While each averment of a pleading is to be simple, concise and direct with no technical forms of pleading being required, Rule 55.04, a pleading does have to contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Rule 55.05. In the record before this court, there is no petition or other pleading showing that the Union is entitled to relief as against Cepowski and Hahn. From all that appears [**5] in this record, the claims against Cepowski and Hahn were abandoned. Appellants' statement of facts asserts that respondents were employed in two bargaining units, although they were not members of the Union. The brief also sets forth parts of the "Joint Statement of Intent" for both bargaining units; namely, the Physical Unit and the Office Unit. The motion for summary judgment filed by the Union and the supporting affidavits make no reference to Cepowski and Hahn. Accordingly, this court affirms the trial court's summary judgment in so far as it relates to any purported claim by plaintiffs against Cepowski and Hahn because, from the record before this court, there was no pleading showing the Union was entitled to relief and no demand for judgment for relief. Rule 55.05.

n6 As can best be determined from the record, the defendants named in CV186-401-CC4 were employees in the Physical Unit of the City Utilities department on February 24, 1986.

n7 Also named as defendants in the amended petition were members of the Office Unit: Rebecca G. James, Patsy Northcutt, Nancy Fox, Rose Gambon, Barbara Johnson, Sharon Sue Truitt and Fran Albright.

[**6]

The law review comment n8 "[t]hat private sector [labor law] precedent is not automatically transferable to the public sector, and . . . what is legal under Taft-Hartley in a General Motors plant is not necessarily legal under state public employee labor legislation in public institutions" is as true today as when the comment was made in 1971. The statutes granting bargaining rights, of a sort, to public employees have been noted as having a "long and tortuous history." *State ex rel. Bd. of Pub. Utilities v. Crow, 592 S.W.2d 285, 289 (Mo.App. 1979).* In *City of Springfield v. Clouse, 356 Mo. 1239, 1252, 206 S.W.2d 539, 546* (banc 1947), the Missouri Supreme Court held that the City of Springfield could not make collective bargaining contracts covering wages, hours and working conditions with labor unions representing its employees. The court held that public employees had the constitutionally protected right to peaceably assemble and present their views to any public officer or legislative body concerning their pay and working conditions, but such rights were not to be confused with or equated to collective bargaining as that term is usually understood in the private sector. [**7] See *Sumpter v. City of Moberly, 645 S.W.2d 359, 361 (Mo.banc 1982).* Further development of the Public Sector Labor Law in Missouri occurred after the City of Springfield adopted its own charter on March 17, 1953, in accordance with the provisions of Mo. CONST. art. VI, § 19 (1945).

n8 Loevi, The Development and Current

Application of Missouri Public Sector Labor Law, *36 Mo.L.REV. 167, 169 (1971)*

After [*540] that charter was adopted, a declaratory judgment was sought as to whether unions could enter into collective bargaining agreements with the Board of Utilities relating to wages, hours and working conditions of the Board of Utilities' employees. The Missouri Supreme Court in *Glidewell v. Hughey, 314 S.W.2d 749, 756 (Mo.banc 1958),* followed Clouse, saying:

[Section] 29, Art. I, Constitution, does not confer any collective bargaining rights upon public officers or employees in their relations with municipal government . . . [U]nder the present charter of the city the whole matter of qualifications, [**8] tenure, compensation and working conditions in the city's public utilities involves the exercise of legislative powers and cannot become a matter of bargaining and contract. n9

n9 This court can and does take judicial notice of the provisions of the City of Springfield home rule charter. *Pollard v. Board of Police Com'rs, 665 S.W.2d 333, 341 (Mo.banc 1984); Purdy v. Foreman, 547 S.W.2d 889, 891 (Mo.App. 1977).* The pertinent provisions of the charter which were the subject of interpretation in *Glidewell v. Hughey, supra,* remained unchanged at the time the Union's alleged cause of action accrued in this case.

The first Public Sector Labor Law was enacted in 1965 and substantially amended in 1967. n10 Early interpretation of the law concluded that:

[T]his act does not purport to give to public employees the same rights to union activities as those enjoyed by employees in private industry . . . .

State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 42 (Mo. 1969). In examining the history [**9] of Public Sector Labor Law in Missouri, a subtle but significant difference is noted between the 1965 legislation and the 1967 legislation. Section 105.520, RSMo 1965 Supp., read:

Any public body may engage in negotiations relative to salaries and other conditions of employment of the public body employees, with labor organizations. Upon the completion of negotiations the results will be reduced to writing and presented to the governing or legislative body in the form of an ordinance or resolution for appropriate action. (Emphasis added.)

n10 The parts of the Public Sector Labor Law pertinent are:

Section 105.510: "Employees . . . of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization . . . ."

Section 105.520: "Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative . . . shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection."

[**10]

Thus, the 1965 legislation, in using the term "negotiations," used a term commonly used in the private sector of employer-labor relations.

The 1967 legislation seemed to take a step backward when it retreated from the word "negotiations" and, in lieu thereof, mandated that the "public body . . . shall meet, confer and discuss such proposals relative to salaries and other conditions of employment . . . ." Section 105.520 RSMo, 1967 Supp. Thus, the 1967 legislation (and indeed the legislation now in effect) goes no further than to codify constitutional rights; i.e., the constitutional right of all citizens, including public employees, to "peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body" as enunciated in *City of Springfield v. Clouse, 356 Mo. at 1246, 206 S.W.2d at 542.* Curators [*541] *of Univ. of Mo. v. Public Serv. Emp. Loc. No. 45, 520 S.W.2d 54, 58 (Mo.banc 1975);* n11 *State ex rel. Missey v. City of Cabool, supra, at 41.*

n11 In *Curators, supra, at 58,* the Missouri Supreme Court said: "We believe the requirements of the Public Sector Labor Law . . . merely provide a procedural vehicle for assertion by defendants of their constitutional rights to peaceably assemble and to petition for redress of grievances."

[**11]

Finally, in *Sumpter v. City of Moberly, 645 S.W.2d 359, n12* the Missouri Supreme Court held that the City of Moberly was not authorized to enter into a binding collective bargaining agreement with a public employee labor organization and, thus, even after a city enacts an ordinance adopting the provisions of a memorandum of understanding with the union, the city could unilaterally change the ordinance (and hence the terms and conditions of employment) without prior union approval. "We hold only that this ordinance did not result in a collective bargaining contract which could be changed only with union approval." Sumpter, at 363 n. 4. Sumpter v. City of Moberly did not hold that the legislative action taken upon receipt of the written results of the discussions had no binding effect, but rather held that "[t]he ordinance, just as any city ordinance, governs and is binding until changed by appropriate action." Sumpter, at 363 n. 4.

n12 It should be noted that much of the "format" for tracing the history of Public Sector Labor Law was taken from Sumpter v. City of Moberly.

[**12]

The foregoing review of the history of Public Sector Labor Law in Missouri is necessary, in part, because perusal of the record in this case shows that the following was not placed in evidence: (a) Joint Statement of Intent which both parties agree was the foundation of the Union's claim, and (b) any evidence that the Joint Statement of Intent was approved by the Board of Utilities by any type of legislative action. In their petition, the Union states that their cause of action is based upon a document entitled "Joint Statement of Intent" which includes an "agency shop" n13 clause which mandates the payment of service fees to the Union by respondents. From examination of the pleadings; admissions made in the briefs; n14 and uncontroverted facts found in the depositions, affidavits and exhibits filed in support of the motions for summary judgment, this court has been able to ascertain the pertinent terms of the Joint Statement of Intent. n15 However, given the peculiar nature of Public Sector Labor Law in Missouri, n16 as outlined above, it is essential that this court be able to determine and know from the record if the Joint Statement of Intent is the "writing" that resulted upon [**13] completion of discussion between the Board of Utilities and the Union. If it is only the written results of the discussions (even though admitted by respondents to have been signed by the Board of Utilities and [*542] Union), n17 it is not, as a matter of law, an instrument that can be used by the Union to collect service fees from the Board of Utilities' employees who are not members of the Union. This follows because § 105.520 does not authorize the Board of Utilities to enter into a collective bargaining contract. *Sumpter v. City of Moberly, 654 S.W.2d at 363; Curators of Univ. of Mo. v. Public Serv. Emp., 520 S.W.2d at 57; State ex rel. Missey v. City of Cabool, 441 S.W.2d at 41.*

n13 "Agency Shop" is defined as: "A union-security device whereby, in order to continue employment, any nonunion member employee is required to pay to the Union sums equivalent to those paid by union members, either in an amount equal to both union dues and initiation fees, or in an amount equal to dues alone." Black's Law Dictionary (5th ed. 1979). As subsequently noted, at least one of the "Joint Statements of Intent" has language that is more akin to a "Maintenance of Membership" clause.

n14 "Where a statement of facts is asserted in one party's brief and conceded to be true in his adversary's brief, the Court of Appeals may consider it as though it appeared in the record." *Smith v. Calvary Educ. Broadcasting, 783 S.W.2d 533, 534 (Mo.App. 1990); Tittsworth v. Chaffin, 741 S.W.2d 314, 315 (Mo.App. 1987).*

n15 The "union security" provisions in the "Joint Statement of Intent" recited in the Union's brief or as made a part of affidavits are attached to this opinion as Appendix "A." Respondents concede the accuracy of the provisions in the Union's brief when, in their brief, they say: "A 'statement of intent' as was entered into in this case is merely the non-binding, non-enforceable agreement . . . between the Union and the City Utilities." (Emphasis added.)

n16 Section 105.520, RSMo 1986, provides, in part: "Upon the completion of discussions [between public body and labor organization], the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection." (Emphasis added.)

n17 Paragraph 5 of the Union's petition alleges: "That the legal document upon which this petition is

based was entered into in Greene County . . . ." Respondents' answer denies that allegation "in that there is no legal document upon which Plaintiffs' petition was based." Paragraph 6 alleges that the City and Union were "signatory to a Joint Statement of Intent, which was entered into with the express intent of defining the respective rights" of respondents. Respondents admit that Paragraph 6 of the Union's petition is true to the extent that the Union and City were signatories of a Joint Statement of Intent, but deny that the City and Union had power to define the conditions of employment with respect to payment of agency fee as a condition of employment with the City. In paragraph 11, the Union alleges: "Pursuant to the terms of the Joint Statement of Intent . . . these defendants, as a condition of their continued employment with the utility [City], are compelled to pay to 'the Union' each month, either regular Union dues or a service charge equal to the regular monthly dues of Union members." In answer to paragraph 11, respondents: "[A]dmit that the Joint Statement of Intent purports to compel the Defendants to pay a service charge to the union, but that provision of the Statement of Intent is null and void as a matter of law and deny that it has any legal effect."

[**14]

On the other hand, if the Joint Statement of Intent was the administrative rule, resolution or "other form" (as alluded to in *Sumpter v. City of Moberly, supra, at 363)* used by the Board of Utilities to adopt a proposal submitted to it by the negotiating team governing wages and working conditions for Board of Utilities' employees represented by the Union, then it must be determined if the union security language applies to the respondents. If that issue is decided in the affirmative, then the issue is squarely before this court as to whether or not union security arrangements for public sector employees are prohibited by § 105.510. n18

n18 Section 105.510 provides: "No such employee shall be discharged or discriminated against because of his exercise of such right [union representation, affiliation, etc.], nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization . . . ."

[**15]

Part of the record before this court is a supplemental brief of respondents in support of their motion for summary judgment. That supplemental brief asserts: "The basis of . . . Plaintiff's suit . . . is the statement of intent entered into between the . . . Union and the City . . . ." Respondents also filed affidavits to which they attached parts of the Joint Statement of Intent in support of their claim that the language served to exempt those hired before November 1, 1982, from the service fees. Respondents' sworn affidavits attached to the supplemental brief stated:

The . . . Union . . . entered into a statement of intent with the City Utilities of Springfield for the Office Unit. The effective dates of statement of intent are July 16, 1987 to July 16, 1990. (Emphasis added)

The Union filed a brief in opposition to respondents' motion for summary judgment. Accompanying the Union's brief were affidavits of Russell Strunk and Dean Moore, Union business representatives. In those affidavits, they assert that the "Joint Statement of Intent . . . was originally negotiated and initiated on or about November 1, 1982." Those assertions are not contradicted by counter affidavits or [**16] other evidence. Considering the provisions of § 105.520, such uncontroverted statement has significance. If the Joint Statement of Intent was only the written results of the negotiations prepared solely for presentation to the appropriate administrative body, the provisions thereof would not have been "initiated," even if signed by the Board of Utilities or members of its negotiating team. *Sumpter v. City of Moberly, supra, at 363; Curators of Univ. of Mo. v. Public Serv. Emp., 520 S.W.2d at 57; State ex rel. Missey v. City of Cabool, 441 S.W.2d at 41.* From this, it is concluded that the Joint [*543] Statement of Intent was the result of an administrative rule, ordinance, resolution or "something else" (per Sumpter) adopted by the appropriate administrative, legislative or other governing body of the Board of Utilities governing wages and working conditions (although not a collective bargaining agreement). It is likewise concluded that the legislative act of the Board of Utilities was not rescinded, amended or modified after its adoption. Accordingly, while the Joint Statement of Intent was not an enforceable contract because of the inability of the Board of [**17] Utilities to enter into a collective bargaining contract with the Union, it was an exercise of legislative authority which continued in effect until changed by appropriate action. *Phipps v. School Dist. of Kansas City, 645 S.W.2d 91, 108 (Mo.App. 1982).*

This court here does not reach the issue of whether or not union security clauses are enforceable in Missouri against non-union public sector employees because the attempted union security clause in the Joint Statement of Intent does not apply to respondents. "Resolution of that issue should await a case in which a decision on

it is essential to the adjudication on appeal." *Fowler v. Fowler, 732 S.W.2d 235, 238 (Mo.App. 1987)* (Crow, C.J., concurring).

In determining that there was a tenable basis for the trial court's summary judgment for respondents, the following facts are significant. The seven respondents (all in the Office Unit) were hired before November 1, 1982. All joined the Union after November 1, 1982. The record is devoid of evidence as to when respondents ceased being union members, but it is clear from the record that they did terminate their union membership. In its brief, the Union claimed respondents stopped [**18] paying the "service charges" after the adoption of the Joint Statement of Intent in 1984. In the Union's pleading, the respondents are never referred to as union members but, rather, are referred to as members of the bargaining unit. The Union's petition seeks from each respondent "a service fee equal to the regular monthly dues of Union members (not including initiation fees, fines, assessments, or any other charges uniformly required as a condition of acquiring or retaining membership)." The Union stated in its motion for summary judgment that it had notified the respondents and requested payment of the "agency fee" (not union dues) before filing the lawsuit. As best as can be gleaned from the record, the Joint Statement of Intent relating to the Office Unit, upon which the Union bases its cause of action, had differing provisions depending upon the period involved. According to the Union's brief (and not contradicted by respondents), the following union security provision was in effect from July 15, 1984, to July 15, 1987 (see Appendix "A"):

Any current Employee working in the classifications covered by this agreement may or may not become a member of the Union, however, [**19] once an Employee becomes a member of the Union, said Employee shall remain a member. Any replacement Employee or any Employee hired after November 1, 1982, shall become a member of the Union or pay a service fee equal to the regular monthly dues of Union members . . . . (Emphasis added.)

By the clear and unequivocal terms of this Joint Statement of Intent (which was initiated by legislative action of the Board of Utilities), respondents were not obligated to pay service fees. They were hired before November 1, 1982. The Statement of Intent does not mandate that employees hired before November 1, 1982 (but who later became union members), had to pay service fees. The Joint Statement of Intent in effect from July 1984 to July 1987 was a "maintenance of membership" n19 clause, except that it made no provision for imposition of penalty on the employees [*544] who later chose not to maintain union membership; i.e., the respondents in this case. By its express terms, the Joint Statement of Intent imposed "service fees" on employees "hired after November 1, 1982." The Joint Statement of Intent did not impose service fees on those hired before November 1, 1982. Instead, the [**20] Joint Statement of Intent provided that if any Employee (which would include those who were hired before November 1, 1982) became a member of the Union, they "shall remain a member." What was to happen, according to the Joint Statement of Intent, as to those employees hired before November 1, 1982, who became union members but then left union membership; i.e., the respondents? Were they to pay a service charge or the agency fee to the Union? The answer is "no," because the Joint Statement of Intent for July 15, 1984, to July 15, 1987, is silent on that issue. It contains no provision requiring such employees to pay a service fee. The provision upon which the Union bottoms its cause of action clearly does not apply to the employees hired before November 1, 1982.

n19 "Maintenance of membership" provisions require that once an employee voluntarily becomes a member of a union, he must maintain his membership for the duration of the contract as a condition of employment. There is no requirement, however, that an employee initially become a member. Yelin, Constitutional Considerations Affecting the Methods of Exacting Union "Fair-Share" Collective Bargaining Fees From Non-Member Public Employees. *1985 DET.C.L.REV. 767, 769.*

[**21] Where employees hired before November 1, 1982, who became union members but then left membership, to be fired when they ceased union membership? n20 The portions of the Joint Statement of Intent before this court (by admissions in the brief) do not contain provisions that require the Board of Utilities to discharge Office Unit employees who ceased being union members. The Joint Statement of Intent for the physical plant employees does provide for discharge of an employee in that bargaining unit if such employee does not join the Union or pay the service fee. (See Appendix "A," Paragraph III). Paragraph 11 of the Union's petition alleges that respondents' continued employment was dependent upon paying the service charge. There is no evidence in the record to support the allegation in paragraph 11 unless the Physical Unit Joint Statement of Intent was applied to Office Unit employees. However, it would not aid the Union to make such claim. Article XVI of the home rule Charter of the City of Springfield is entitled "Board of Public Utilities." Section 16.7 of

that Charter, entitled "Powers," provides:

The said board of directors shall have all the powers necessary, desirable, or [**22] convenient to manage, control, and operate such public utilities, and by way of description but not of limitation, the board shall have the power to hire such persons in the manner herein provided as are necessary to operate the said utilities . . . . (Emphasis added.)

In Section 16.14 of the Charter, the "manner" of hiring and discharging public utility employees was provided as follows:

[A]ll other employees [other than the manager, his assistants and department heads] shall be hired, promoted, reduced or discharged in accordance with rules established by the board designed to secure and retain employees strictly on the basis of merit . . . . (Emphasis added.)

The Charter provisions relating to Springfield's Board of Public Utilities, were exhaustively examined in *Glidewell v. Hughey, 314 S.W.2d at 755:*

The Charter provision (16.14) is that "employees shall be hired, promoted, reduced or discharged in accordance with rules established by the Board designed to secure and retain employees strictly on the basis of their merit and without regard to favoritism." This is a delegation of legislative power by the Charter to the Board to set up a merit system of [**23] employment, separate from the merit system provided by the Charter (6.5, 6.6) . . . . It is specified that this is to be done by "rules established by the Board" and the Board has no authority to do it in any other way, certainly not to contract away this authority. (Emphasis added)

n20 In paragraph 11 of its pleading, the Union alleges that "Pursuant to the terms of the Joint Statement . . . defendants, as a condition of their continued employment with the utility, are compelled to pay to 'the Union' each month, either regular Union dues or a service charge equal to the regular monthly dues of Union members."

The [*545] merit system delegated to the Board of Public Utilities by Charter Provision 16.14 is limited in scope. The Board is limited by Charter Provision 16.14 to promulgating rules regarding retention of employees "strictly on the basis of their merit." Attempts by the Board of Utilities at legislative action that provides for discharge of employees solely because such employees failed to pay [**24] a service fee to the Union is beyond the power delegated to the Board of Utilities by Chapter XVI of the Springfield Charter. Courts in other states have found union security agreements contrary to the "merit and fitness" clause of civil service laws. Thus, in *Allegheny Cty. Fire. Loc. 1038 v. County of Allegheny, 7 Pa. Commw. 81, 299 A.2d 60 (1973),* a county government refused to implement a union security provision presented to it as a result of a "binding arbitration" proceeding. In determining that such binding arbitration provision could not be implemented by the county, the court said:

While this provision neither compels union membership nor dues check-off by the County, it does clearly provide that either union membership or retention of good-dues-standing is required of all firemen "as a condition of continued employment." It thus contemplates the discharge from county employment of any fireman who is not in good-dues-standing with a union to which he may or may not belong. By so providing it is in direct conflict with statutory law governing the discharge of firemen by second class counties. The Act . . . affords civil service protection to such employees and prohibits [**25] their discharge except for certain stated reasons none of which relate to union security. To comply with this provision of the disputed award, the County would be required to discharge a fireman contrary to the statutory law governing discharge of firemen. By arbitration procedure under the Act, a local government cannot agree or be required to perform an illegal act.

Allegheny, supra, at 62.

In *Foltz v. City of Dayton, 27 Ohio App. 2d 35, 272 N.E.2d 169, 56 Ohio Op. 2d 213 (1970),* the City of Dayton, an Ohio charter city, following union negotiations, changed its disciplinary rules so as to provide for discipline of an employee who was in a bargaining unit and failed to pay his monthly service charge. Section 10, Article XV of the Constitution of Ohio provided:

Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness . . . .

Foltz, supra, at 172 (emphasis added). The court ruled that the City's civil service rule that allowed for discipline of an employee for not paying service fees to the Union was not a valid exercise of the city's powers of local self-government and [**26] that it did conflict with the Ohio constitutional provision concerning appointments of city employees based on merit and fitness.

It is the opinion of this court that Springfield Charter Provision 16.14 does not empower the Board of Utilities to adopt rules or "legislation" which penalizes employees in any fashion, either by demotion or discharge, for fail-

ure to remain union members or for failure of non-union employees to pay service fees. It is the further opinion of this court that for the period July 15, 1984, through July 16, 1987, respondents, who had been hired before November 1, 1982, had joined the Union after 1982, and had left the Union after July 15, 1984, were not obligated to pay service fees because the Joint Statement of Intent adopted by the Board of Utilities did not impose the fees on those employees.

Bearing in mind that the Joint Statement of Intent was the exercise of legislative authority which continued in effect until changed by appropriate action (*Sumpter v. City of Moberly, supra, at 363; Phipps v. School Dist. of Kansas City, supra, at 108),* the Board of Utilities did change the Office Unit Joint Statement of Intent. Effective July 16, 1987, and [**27] through July 16, 1990, the Joint Statement of Intent provided:

Since the Union is the certified representative of all

Employees in the Bargaining Unit and each Employee in the Bargaining Unit benefits equally from such representation without regard to whether he [*546] is a member of the Union, it is fair that each Employee in the Bargaining Unit hired after November 1, 1982, shall assume his fair share of the expense of such representation. (Emphasis added.)

On its face, the last mentioned Joint Statement of Intent would seem to be in keeping with the 1984 Joint Statement of Intent in that neither imposed the service fee on employees hired before November 1, 1982. The Union filed affidavits in opposition to respondents' motion for summary judgment. Those affidavits state, in part:

The new language referred to in defendants' most recent suggestions was negotiated on or about July 16, 1987. The bargaining intent of the Union and the Utility was to make the language in the new agreement commensurate with the language in the Joint Statement of Intent covering the Physical Unit. . . . [T]his new language was intended to cover only two employees, Barbara Marshall and [**28] John Miller, who are employees of the Utility employed in the Office and Clerical Unit. Both of these employees were employed prior to November 1, 1982, and had never become members of the Union. As a result, they are not required to pay an agency fee and the Union has never taken the position that they should be required to do so. . . . Therefore, in actuality, after the first Joint Statement of Intent was entered into, all of these defendants became members of the Union and agreed to adhere to, conform to, and abide by the constitution and laws of the International Brotherhood of Electrical Workers and its Local Unions. Therefore, it is the position of the Union that any position of these defendants that they are grandfathered out of the Joint Statement of Intent is not meritorious.

From the above, it is seen that the Union's position is that once respondents joined the Union, their union membership subjected them to the service fee provision. That argument is faulty for two reasons. First, it is clear from the Union's pleading and from its affidavits that its claim to recover service fees was confined to and was founded upon the Joint Statements of Intent. Indeed, it must be so, [**29] because once the respondents ceased being union members they were no longer bound to abide by the Constitution of the International Brotherhood of Electrical Workers and its Local Unions. The Union is not attempting to collect union dues; it is not attempting to enforce its Constitution and bylaws. It is attempting to recover service fees based upon Joint Statements of Intent legislatively adopted by the Board of Utilities. Accordingly, the fact that respondents joined the Union or didn't join the Union has nothing to do with the Union's cause of action which is admittedly grounded on the Board of Utilities' legislative action.

The second reason why the Union's argument fails is that the Joint Statements of Intent (1984 version and 1987 version) are clearly written. The provisions are unambiguous. The unequivocal terms of those documents fail to impose service fees on employees hired before November 1, 1982. Whether they later joined the Union is of no moment. The Joint Statements of Intent were the legislative documents of the Board of Utilities and the first rule of statutory construction is to give effect to the intent of the legislative body. *State v. Burnau, 642 S.W.2d 621, [**30] 623 (Mo.banc 1982).* While it is proper to consider history of legislation where ambiguity exists, *Kieffer v. Kieffer, 590 S.W.2d 915, 918 (Mo.banc 1979),* this court finds no ambiguity here. *State ex rel. Mo. State Bd. v. Southworth, 704 S.W.2d 219, 59 A.L.R.4th 915 (Mo.banc 1986).* Words used in legislation must be accorded their plain and ordinary meaning. *State v. Burnau, 642 S.W.2d at 623.* The plain language of the Joint Statements of Intent exclude respondents from paying those fees because each of the respondents were hired by the Board of Utilities before November 1, 1982. Where the language of the legislation is plain and admits of but one meaning, there is no room for construction. *State ex rel. Mo. State Bd. v. Southworth, supra, at 224.* This Court must construe the Joint Statements of Intent as they stand, *England v. Eckley, 330 S.W.2d 738, 744 (Mo.banc 1959),* and give effect to them as written. *State v. Patton, 308 S.W.2d 641, 644 [*547] (Mo.banc 1958).* To engraft onto the Joint Statements of Intent language that "if employees hired before November 1, 1982, subsequently

joined the Union, they shall pay service fees if they cease union membership [**31] but remain employed in the bargaining unit," would be to disregard the maxim of statutory construction that the legislative intent, insofar as possible, is to be determined from the language of the legislation itself. *State ex. rel. Mo. State Bd. v. Southworth, supra, 224-25; State v. Sweeney, 701 S.W.2d 420, 422-23 (Mo.banc 1985).*

The judgment of the trial court is affirmed.

APPENDIX "A"

I.

Effective July 15, 1984, to July 15, 1987, for the Office Unit

ARTICLE VII - UNION SECURITY - CHECKOFF

A. Any current Employee working in the classifications covered by this agreement may or may not become a member of the Union, however, once an Employee becomes a member of the Union, said Employee shall remain a member. Any replacement Employee or any Employee hired after November 1, 1982, shall become a member of the Union or pay a service fee equal to the regular monthly dues of Union members (not including initiation fees, fines, assessments or any other charges uniformly required as a condition of acquiring or retaining membership) after completing the six (6) month probationary period.

II.

Effective July 16, 1987, to July 16, 1990, for the Office Unit

ARTICLE [**32] VIII - UNION SECURITY - CHECKOFF

Section 1. Since the Union is the certified representative of all Employees in the Bargaining Unit and each Employee in the Bargaining Unit benefits equally from such representation without regard to whether he is a member of the Union, it is fair that each Employee in the Bargaining Unit hired after November 1, 1982, shall assume his fair share of the expense of such representation.

III.

Effective July 15, 1985, for the Physical Unit

ARTICLE VIII, §§ 1-3

Section 1. Since the Union is the certified representative of all employees in the bargaining unit and each employee in the bargaining unit benefits equally from such representation without regard to whether he is a member of the Union, it is fair that each employee in the bargaining unit assume his fair share of the expense of such representation.

Section 2. Employees are free to either join or not join the Union. All present regular, non-probationary employees who are not Union members but work in a bargaining unit represented by the Union shall, immediately following a 30-day period from the date hereof, as a condition of continued employment, pay to the Union each month, pursuant to authorization [**33] for payroll deduction there for as hereinafter referred to, a service charge equal to the regular monthly dues (not including initiation fees, fines, assessments, or any other charges uniformly required as a condition of acquiring or retaining membership) paid to the Union by an employee in the same bargaining unit who is a Union member.

Section 3. All new employees who do not become Union members after completing six (6) continuous months of employment shall, as a condition of continued employment, pay to the Union each month commencing after said date, pursuant to authorization for payroll deduction therefor as hereinafter referred to, a service charge equal to only the regular monthly dues (not including initiation fees, fines, assessments or any other charges uniformly required as a condition [*548] of acquiring or retaining membership) paid to the Union by an employee in the same bargaining unit who is a Union member. Upon failure of any non-member employee to pay or tender the above mentioned service charge, the Utility will discharge such employee when requested to do so by the Union.

ON MOTION FOR REHEARING OR TRANSFER

By motion for rehearing, or alternatively to [**34] transfer, the Union again vociferously argues that there is a compelling need to resolve the question of whether § 105.510, RSMo 1986, permits or precludes agency shop provisions as a lawful issue in public sector labor negotiations. This court agrees that resolution of that issue would be beneficial to public sector labor organizations and employers in the public sector. However, because the issue is important, and because meaningful guidance on the question is necessary, resolution thereof should be deferred until the issue has been squarely placed before an appellate court in a case where there is sufficient record made, and presented to the appellate court, to indicate that deciding such an important issue is essential to the resolution of the case. That is not the situation presented by this record. For example, the "joint statements of intent" for the "office unit" and "physical unit" employees were the writings upon which the Union based its cause of action in Count I and Count

II; n1 yet, those statements of intent were not a part of the record presented to the trial court nor to this court. n2 The joint statements of intent were not attached by the Union to its petition, [**35] nor to the motion for summary judgment, nor to the affidavits and other documents filed in support of its motion for summary judgment, nor were they attached to the instruments filed in opposition to the respondent's motion for summary judgment. With the evidence so limited, the trial court entered summary judgment in favor of the respondents and against the Union. n3 Significantly, the judgment in this case contained no declaration of the rights of the parties and did not include declarations in its judgment as is required if the pleadings state a cause of action for a declaratory judgment. *Zaiser v. Miller, 656 S.W.2d 312, 315 (Mo.App. 1983).* In its brief filed with this court, the Union completely ignored the declaratory judgment count. For example, in its brief, the Union said:

Subsequent to the enactment of these provisions ["joint statements of intent"], certain bargaining unit employees . . . stopped paying the service charges (hereafter referred to as agency fees) required by the respective joint statements and Local 753 brought a collection suit against them . . . . The Respondents defended on four grounds: that § 105.510, R.S. Mo, prohibits agency fees; that [**36] the joint statements of intent were not binding and enforceable with respect to the Respondents; that the agency fee agreements [*549] violated the Respondents' rights under the United States Constitution; and that the agency fee requirements of the joint statements of intent did not apply to certain of the Respondents.

* * *

Although the Circuit Court is not required to issue a detailed analysis, the absence of any findings of fact and conclusions of law makes [sic] this case extremely difficult to brief. For example, while we find it hard to believe, we must assume that the Circuit Court ruled in Respondents' favor on all four points which Respondents raised in their motion for summary judgment. Accordingly, we must address them all in this brief. (Emphasis added).

n1 Count I was a collection effort relying upon the "office unit" statement of intent. Count II sought a declaration of the rights of all non-union Board of Utility employees who worked in a bargaining unit represented by the Union.

n2 The joint statement of intent for the office unit for the period of July 16, 1987, through July 16, 1990, was attached to affidavits of certain respondents in support of their defense that the office unit statement of intent did not apply to them because they were hired before November 2, 1982; but that was the ONLY statement of intent contained in the record presented to the trial court as that record was revealed to this court by the legal file.

[**37]

n3 The trial court's order, in pertinent portion, read: "The Court has heard arguments on the motions for summary judgment filed by plaintiffs and defendants in these two cases which have been consolidated. Having duly considered all of the pleadings and affidavits, depositions and exhibits, the Court has found that the summary judgment motion filed by defendants should be sustained and the summary judgment motion filed by plaintiffs should be overruled. . . . NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND RULED AS FOLLOWS: 1. Pursuant to Rule 74.04(b), the motions by defendants for summary judgment dismissing the petitions herein, is hereby sustained. Pursuant to Rule 74.01(b), the Court further finds that there is no just reason for delaying the finality of said judgment and therefore said judgment shall be . . . appealable . . . ."

There was sufficient substantial evidence to support the trial court's judgment based upon the office unit's defense that the joint statements of intent did not apply to them because they were hired before November 1982. The other issues did not have to be [**38] addressed in order to affirm the trial court's judgment. With regard to Count II, the record is barren of any objection, by the Union, directed to the trial court about the failure of the trial court to make a declaration of the rights of the parties and include such declarations in its judgment. Certainly no issue was presented or briefed by the Union on this appeal concerning the failure of the trial court to make findings and declarations in response to the request in Count II for a declaratory judgment. To the contrary, the Union said, on appeal, that it had brought a "collection suit" against respondents and that the trial court was not "required to issue a detailed analysis." Such pronouncements directly contradict any claim by the Union of a viable issue presented to this court concerning the declaratory judgment count. Accordingly, this court could only assume that the parties and the trial court treated the issues in the declaratory judgment count as abandoned, or that the trial court's judgment amounted

to a determination that Count II did not state a cause of action for declaratory judgment and the Union thereafter totally abandoned that issue. *Casper v. Hetlage, 359 [**39] S.W.2d 781, 783 (Mo. 1962).*

Whatever the reason might be for the trial court's failure to make a declaration of the parties' rights, the Union did not present that failure as alleged error to the trial court. It is a fundamental rule that contentions not put before the trial court will not be considered by the appellate court; an appellate court will not convict a trial court of error on an issue which was not put before it to decide. *Casper v. Hetlage, supra, at 783; Estate of Huskey v. Monroe, 674 S.W.2d 205, 208 (Mo.App. 1984).* Where a declaratory judgment action is filed, if the pleadings state a cause of action, the trial court must make a declaration of the rights of the parties and include such declarations in its judgment. *Zaiser v. Miller, supra, at 315.* On appeal, the Union did not brief, or otherwise present, a complaint of error in the failure of the trial court to make a declaration of the rights of the parties. Accordingly, this court concludes, and remains convinced, that the Union's appeal on the declaratory judgment count was abandoned. *Estate of Huskey v. Monroe, supra, at 208; Komanetsky v. Missouri State Medical Association, 516 S.W.2d 545, [**40] 549 (Mo.App. 1974).* "An appellant has a duty to furnish an adequate record by which allegations of error can be reviewed with some degree of confidence." *Daniels v. Griffin, 769 S.W.2d 199, 200 (Mo.App. 1989).* n4

n4 This court clearly recognizes that when, as here, a declaratory judgment is sought and a trial court fails to make a declaration settling the rights (as when it dismisses a petition without a declaration), a reviewing court may make a declaration. *Nicolai v. City of St. Louis, 762 S.W.2d 423, 426 (Mo.banc 1989).* However, exercise of appellate court discretion to go forward with a declaration of rights in such case is normally confined to those instances where there are no disputed facts and the record clearly indicates the issue is purely a legal one. *Nicolai v. City of St. Louis, supra, at 426; Magenheim v. Board of Education, 347 S.W.2d 409 (Mo.App. 1961).* This court does not believe the record presented in this case is such that it should exercise its discretion to declare the rights of the parties. Deciding an issue as important as what the parties here perceive this issue to be, should be left to a case where the record clearly reflects that deciding the issue was necessary. In such instance, the decision is not open to being distinguished or criticized and can be clearly relied upon.

[**41]

Appellate [*550] review presupposes a record and evidence from which the appellate court can perform the review with some degree of confidence in the reasonableness, fairness and accuracy of the final decision. *Zaiser v. Miller, supra, at 318.* The record and evidence in this case was not sufficient to convince this court that it should decide the important issue of the lawfulness of agency fee provisions in public sector labor relations when the issues, as presented by the record, could be resolved without reaching such issue.

The following additional contention found in the motion for rehearing or transfer should be addressed for clarification:

. . . [T]hat portion of the Court's opinion dismissing Appellant's appeal as to Joseph Hahn is erroneous for the reason that Appellants have never abandoned their claim against Mr. Hahn . . . . Mr. Hahn's name plainly appears on the caption of the First Amended Petition and plainly appears throughout the pleadings in Case No. CV186-401CC1. Moreover, Count II of Plaintiff's First Amended Petition clearly seeks relief with regard to "all present regular, non-probationary employees . . . who are not union members, but who work [**42] in a bargaining unit represented by said unions . . ." Defendant Hahn is clearly addressed by this pleading, and Appellants' appeal with regard to him, and hence the physical unit, should not be abandoned for the reason that it is important for all units to be considered in the Court's Opinion for the reasons cited above.

Clearly, whether the Union intended to do so or not, it omitted any claim against Joseph Hahn in Count I. As contained in the legal file furnished this court, Hahn's name does not "appear[] throughout the pleadings in Case No. CV186-401CC1." n5 A copy of Count I of the first amended petition is attached as an appendix hereto. n6

n5 The only pleadings presented to this court were the Union's first amended petition, answer to first amended petition with affirmative defenses and counterclaim, motion of Union for summary judgment with affidavits. None of those pleadings refer to Hahn (other than in the caption). Affidavits filed in support and in opposition of the motions for summary judgment, which mentioned other defendants, never mentioned Hahn or offered facts regarding Hahn.

n6 Hahn and Cepowski were not named as parties

to the counterclaim filed by the defendants against the Union, whereas all the employees in the "Office Unit" (those against whom relief was sought in Count I) did file counterclaims against the plaintiff.

[**43]

This court never considered Count II to apply to Hahn, and properly so. The Union clearly abandoned Count II as it related to Hahn and Cepowski. n7 Count II of the Union's petition is attached as a part of the appendix. The pleading recites:

Come now the plaintiffs, as and for Count II of their cause of action against defendants Rebecca G. James, Patsy Northcutt, Nancy Fox, Rose Gambon, Barbara Johnson, Sharon Sue Truitt and Fran Albright, and state to the court as follows: . . . . (Emphasis added.)

There then follows a paragraph incorporating the allegations of paragraphs 1-17 of Count I of the first amended petition (all of which relate to the employees of the office unit). Hahn was omitted as a party to Count II and by incorporating Count I into Count II without additional pleadings, only the "office unit" employees and the office unit "joint statement of intent" were included in Count II.

n7 In the suggestions filed in support of the motion for rehearing or to transfer, the Union says: "During the passage of time during which this litigation has been pending, several of the affected employees have decided to pay their monthly service charges as requested by the Union, and, therefore, by stipulation, the lawsuit against these employees was dismissed and the issues with regard to them became moot." Later in that memorandum, the Union says, "Although . . . Cepowski later recanted and decided to pay his monthly fees, Hahn remains a viable party to this lawsuit. . . ." The record presented to this court simply does not support the Union's assertions. Nowhere in the docket sheets contained in the legal file is there an indication that any employee was dismissed from the lawsuit. Rather, the parties simply continued to carry the names Hahn and Cepowski on the caption of the pleadings but ceased making allegations in the body of the pleadings as against those two individuals.

[**44]

The [*551] motions of the Union for rehearing or in the alternative for transfer to the Missouri Supreme Court are denied.

APPENDIX

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI DIVISION 4

RUSSELL STRUNK and DEAN MOORE,

Individually and as Officer, Agents, and Representatives of a Class Consisting of the Membership of the

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION NO. 753,
Plaintiffs,

vs.

PAT C. CEPOWSKI and JOSEPH L. HAHN,
Defendants,

and

RUSSELL STRUNK and DEAN MOORE,

Individually and as Officer, Agents, and Representatives of a Class Consisting of the Membership of the

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION NO. 753,

Plaintiffs,

vs.

REBECCA G. JAMES, PATSY NORTHCUTT, NANCY FOX, ROSE GAMBON, BARBARA JOHNSON, SHARON SUE TRUITT and FRAN ALBRIGHT, Defendants.

Case No. CV186-401-CC1

Case No. CV186-750-CC2

FIRST AMENDED PETITION

COUNT I - PETITION

Come now the plaintiffs, and for Count I of their First Amended Petition against defendants state to the court as follows:

1. Plaintiffs Russell Strunk and Dean Moore are offi-

cers [**45] and agents of the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 753, and are residents of Greene County, Missouri.

2. The International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 753 (hereinafter "the Union") is an unincorporated labor organization with its headquarters located at 2902 East Division, Springfield, Greene County, Missouri, and is the certified bargaining representative of all employees of the City Utilities of Springfield, Missouri, employed in the "Office Unit" of said utility.

3. That the full membership of said class of said Union is numerous, and the names of each member, agent, and representative of said class cannot, without great delay and difficulty, be added as plaintiffs in this action, but that this action is brought by plaintiffs Strunk and Moore with the consent of the membership of said class, and for the benefit of said class, and that plaintiffs Strunk and Moore adequately represent all of the she members of said class.

4. That all defendants herein are residents of Greene County, Missouri.

5. That the legal document upon which this petition is based was entered into in Greene County, Missouri.

6. That, [**46] at all times mentioned herein, Local Union No. 753, "the Union," and the City Utilities of Springfield, Missouri, were signatory to a Joint Statement of Intent, which was entered into with the express intent of defining the respective rights, duties, and obligations concerning wages, hours, rules, and other conditions of employment, for certain employees of the City Utilities of Springfield, Missouri, employed in the unit of employees hereinafter referred to as the "Office Unit," including defendants James, Northcutt, Fox, Gambon, Johnson, Truitt, and Albright.

7. That the aforesaid Joint Statement of Intent was in full force and effect at all times mentioned herein, and with respect to the Union, the utility, and all defendants herein, it does define their respective rights, duties, and obligations concerning wages, hours, rules, and other conditions of employment.

[*552] 8. That with concern to the issues of wages, hours, rules, and other conditions of employment, defendants James, Northcutt, Fox, Gambon, Johnson, Truitt, and Albright do benefit from the aforesaid Joint Statement of Intent and as such, are third party beneficiaries of such statement.

9. That, regardless of [**47] whether or not these defendants are current members of "the Union" they benefit equally from the representation of "the Union" for collective bargaining purposes, and, pursuant to Article VII, Section A, of the Joint Statement of Intent, they are required to pay to the Union either Union dues or a service fee equal to the regular monthly dues of Union members (not including initiation fees, fines, assessments, or any other charges uniformly required as a condition of acquiring or retaining membership).

10. That defendants James, Northcutt, Fox, Gambon, Johnson, Truitt, and Albright are members of the appropriate bargaining unit of employees (the "Office Unit") to which "the Union" is the certified bargaining representative.

11. Pursuant to the terms of the Joint Statement of Intent, all Bargaining unit employees, including these defendants, as a condition of their continued employment with the utility, are compelled to pay to "the Union" each month, either regular Union dues or a service charge equal to the regular monthly dues of Union members.

12. That the monthly service charge owed by defendant James to "the Union" is Three Hundred Eighty-one and 04/100 Dollars ($ 381.04). [**48]

13. That the monthly service charge owed by defendant Northcutt to "the Union" is Three Hundred Six and 40/100 Dollars ($ 306.40).

14. That the monthly service charge owed by defendant Fox to "the Union" is Two Hundred Fifty-one and 04/100 Dollars ($ 251.04).

15. That the monthly service charge owed by defendant Gambon to "the Union" is One Hundred Twenty-one and 24/100 Dollars ($ 121.24).

16. That the monthly service charge owed by defendant Johnson to "the Union" is Three Hundred Two and 43/100 Dollars ($ 302.43).

17. That the monthly service charge owed by defendant Truitt to "the Union" is Twenty and 81/100 Dollars ($ 20.81) per month from March, 1987, forward until settled.

18. That the monthly service charge owed by defendant Albright is Twenty-one and 45/100 Dollars ($ 21.45) per month from March, 1987, forward until settled.

19. That although "the Union" has repeatedly requested of defendants James, Northcutt, Fox, Gambon, Johnson, Truitt, and Albright that they pay the aforesaid arrearages, they have fabled and refused to do so.

WHEREFORE, in this Count I of plaintiff's petition, plaintiffs respectfully request judgment against defen-

dant Rebecca G. James in the amount [**49] of Three Hundred Eighty-one and 04/100 Dollars ($ 331.04); and against defendant Patsy Northcutt in the amount of Three Hundred Six and 40/100 Dollars ($ 306.40); and against Defendant Nancy Fox in the amount of Two Hundred Fifty-one and 04/100 Dollars ($ 251.04); and against defendant Rose Gambon in the amount of One Hundred Twenty-one and 24/100 Dollars ($ 121.24); and against Defendant Barbara Johnson in the amount of Three Hundred Two and 43/100 Dollars ($ 302.43); and against Sharon Sue Truitt in the amount of Twenty and 81/100 Dollars ($ 21.91) per month from March, 1987, forward until settled; and against Fran Albright in the amount of Twenty-one and 45/100 Dollars ($ 21.45) per month from March, 1987, forward until settled; and for such other amounts and arrearages as may come due in the future, as alleged in Count I of this First Amended Petition; for a reasonable attorney's fee and costs of this action; and for such other and further relief as the Court may deem appropriate under the circumstances.

COUNT II - DECLARATORY JUDGMENT

Come now the plaintiffs, as and for Count II of their cause of action against [*553] defendants Rebecca G. James, Patsy Northcutt, Nancy [**50] Fox, Rose Gambon, Barbara Johnson, Sharon Sue Truitt, and Fran Albright, and state to the Court as follows:

1. That plaintiffs restate and reallege and incorporate herein By reference paragraphs 1 through 17 of Count I of their First ended Petition as if realleged herein in haec verba.

2. That plaintiffs Moore and Strunk, as officers and agents of "the Union," as aforesaid, have fiduciary and good faith duty to fairly represent all of the members of the Local Union No. 753, and all of the employees of the City Utilities of Springfield, Missouri, employed in appropriate bargaining units represented by Local Union No. 753, and, as such, must insist on strict compliance of all terms, duties, and obligations contained in the Joint Statement of Intent referred to in Count I of plaintiffs' First Amended Petition.

3. The plaintiffs further allege that, by reason of the above and foregoing, it is necessary for the protection of the class consisting of the membership of "the Union" and of the appropriate bargaining unit employees of the City Utilities of Springfield, Missouri, that plaintiffs secure a declaratory judgment as to the existence or non-existence of the rights, powers, privileges, [**51] and immunities of the parties hereto, upon the facts alleged herein, and of the existence or non-existence of the facts upon which such rights, powers, privileges, and immunities now exist or will arise in the future.

WHEREFORE, the plaintiffs respectfully request that a declaratory judgment be issued by this Court ordering, adjudging, and decreeing that all present regular, non-probationary employees of the City Utilities of Springfield, Missouri, who are not Union members, but who work in a bargaining unit represented by said Union, shall, as a condition of their continued employment, pay to the said Union each month, a service charge equal to the regular monthly dues (not including initiation fees, fines, assessments, or other charges uniformly required as a condition of acquiring or retaining a membership) paid to the Union by an employee in the same bargaining unit who is a Union member; for reasonable attorney fees and costs and expenses of this litigation; and for such other and further declaratory judgment, order, or relief as may be just and proper.

Douglas W. Greene, III

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J

645 S.W.2d 359 printed in FULL format.

Larry Sumpter, Terry Riles, Mike Congdon, John Stufflebean, Eugene Sims, Earl Lawson, Douglas Henry, Andrew Morrison, Robert Akers, Robert Dutton, Ronald Combs and Raymond Hill, Plaintiffs-Appellants, v. City Of Moberly, Missouri, Defendant-Respondent

No. 64014

Supreme Court of Missouri

645 S.W.2d 359; 1982 Mo. LEXIS 422; 112 L.R.R.M. 2787

December 16, 1982

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Overruled February 23, 1983. Opinion Modified in Per Curiam on Court's Own Motion for Rehearing. Dissenting Opinion by Donnelly filed.

PRIOR HISTORY:

From the Circuit Court of Randolph County

Civil Appeal

Judge Samuel E. Semple

DISPOSITION: Judgment Affirmed.

CORE TERMS: public body, binding, ordinance, duty, modify, governing body, curators, public employees, Public Sector Labor Law, grievances, bargaining, memorandum, legislative body, collective bargaining, collective bargaining agreement, firefighter, salaries, wages, confer, designated representative, meaningless, authorize, training, repealed, enjoined, charter, bargaining representative, conditions of employment, modification, enforceable

COUNSEL: N. E. Brown, Elizabeth A. Keller, Huntsville, Missouri, Attorneys for Appellants.

Michael E. Kaemmerer, St. Louis, Missouri, Marion E. Lamb, Moberly, Missouri, Attorneys for Respondent.

John H. Goffstein, Darold E. Crotzer, Jr., Clayton, Missouri, Rhonda C. Thomas, Columbia, Missouri, Robert J. Connerton, Theodore T. Green, Washington, District of Columbia, Howard C. Wright, Springfield, Missouri, Charles A. Werner, St. Louis, Missouri, Louis J. Leonatti, Mexico, Missouri, John Ashcroft, Carl S. Yendes, Jefferson City, Missouri, Attorneys for Amicus Curiae.

JUDGES: Finch, Sr.J. Rendlen, C.J., Welliver, Higgins and Gunn, JJ, concur. Seiler, Sr. J., dissents in separate dissenting opinion filed. Donnelly, J., dissents in separate dissenting opinion filed.

OPINIONBY: PER CURIAM; FINCH

OPINION: [*359] Plaintiffs, members of the Professional Firefighters Association of Moberly, Missouri, Local 2671, filed suit [**2] seeking injunctive relief to prevent defendant City of Moberly from violating certain provisions of what plaintiffs claim is a binding collective bargaining agreement. The City filed a motion to dismiss the petition on the ground that it failed to state a claim on which relief could be granted in that the [*360] document relied upon was not an enforceable contract binding upon the City. The court sustained the motion and dismissed the petition. Plaintiffs appealed to the Missouri Court of Appeals, Western District, which reversed and remanded for trial. On application the case was ordered transferred to this Court and is decided by us as though here on direct appeal. We utilize portions of the Court of Appeals opinion without the use of quotation marks. We affirm.

Acting pursuant to the provisions of §§ 105.500 - 105.530 RSMo 1978, n1 sometimes popularly referred to as the Public Sector Labor Law, firefighters employed by the city formed and joined the Professional Firefighters Association of Moberly, Missouri, Local 2671, a labor organization which was certified by the State Mediation Board as the exclusive representative for the firefighters. That organization, as authorized [**3] by § 105.510, n2 presented proposals relative to salaries and other conditions of employment to the City of Moberly.

n1 All statutory references, unless otherwise indi-

cated, are to RSMo 1978.

n2 The portion of § 105.510 pertinent to this case is as follows:

"Employees, except police, deputy sheriffs, Missouri state highway patrol, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through representatives of their own choosing . . ."

Thereafter, pursuant to § 105.520 n3 the results of discussions with the City concerning the union's proposals were incorporated in a written Memorandum of Understanding which was presented to the City Council. It covered wages, overtime pay, call back pay, sick leave, holidays and other allowances, duty tours, training, and many other subjects beginning [**4] July 1, 1980, with a provision for automatic renewal every two years in the absence of notice of intention to modify. In May, 1980 the City Council enacted an ordinance adopting the provisions of the Memorandum of Understanding "as the terms and working conditions for Local 2671" for the term of that document.

n3 Section 105.520 provides:

"Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection."

[**5]

On January 28, 1981, the City Manager of Moberly sent a memorandum to all fire department personnel that effective February 1, 1981, the work schedule for the department would be 24 hours on duty, followed by 48 hours off duty. This represented a change from the schedule in the Memorandum of Agreement which called for 24 hours on duty every other day for 12 days, followed by 7 days off duty. The Manager's Memorandum stated that one additional firefighter would be hired and that the change in schedule was "necessary to provide adequate on-duty personnel to mann (sic) the fire stations, to accommodate 911 emergency calls and to effectuate a logical training schedule." It went on to advise that by reason of "inability of the Training Committee to agree on a Training Program" a program therein outlined would be instituted in lieu of the in-service training program set out in the Memorandum of Understanding. The City Manager's notice recited that it had been approved by the Mayor and City Council.

Plaintiffs allege that the notice from the City Manager constitutes a unilateral change in duty tours and training schedules from those specified in the agreement negotiated between the City [**6] and Local 2671, and that such unilateral acts violate the terms of said agreement. They seek to have the City enjoined from making such changes or [*361] any other unilateral changes from the terms of the agreement as embodied in the Memorandum of Understanding.

The question thus presented on this appeal is whether a memorandum of the results of discussions pursuant to § 105.520, after approval or adoption of those results by the City Council, constitutes a binding collective bargaining agreement which is enforceable on the City of Moberly.

The question of whether a Missouri city may enter into a binding collective bargaining agreement with its employees was addressed at length in *Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539* (banc 1947). That case involved an appeal in a declaratory judgment action wherein the City of Springfield sought a determination of its power to make collective bargaining contracts covering wages, hours, and working conditions with labor unions representing its employees. This Court held that it could not make such contracts, concluding that under the separation of powers doctrine as enunciated in the Missouri Constitution, the whole matter [**7] of qualifications, compensation, tenure and working conditions of employees are matters for legislative determination which, absent constitutional authorization, cannot be delegated or contracted away.

In the course of that decision the Court recognized that all citizens have the right under both federal and state constitutions to peaceably assemble, to speak freely, and to present their views to any public officer or legislative body. It held that employees have such rights in connection with establishment of their pay and working conditions. However, said the court, such rights are not to be confused with or equated to collective bargaining as that term is usually understood in the private sector.

In so ruling, the court considered the provisions of Article I, § 29 of the Missouri Constitution, which provides "that employees shall have the right to organize and to bargain collectively through representatives of their own choosing." The Court, for reasons detailed in it's opinion, concluded that this provision applies only to the private sector and is not applicable to public employees.

Subsequently, in *Glidewell v. Hughey, 314 S.W.2d 749* (Mo. banc 1958), this Court again [**8] discussed whether public employees have a right to collective bargaining. In that case a declaratory judgment was sought as to whether, after Springfield adopted a city charter, unions could enter into collective bargaining agreements with Springfield's board of public utilities respecting wages, hours and working conditions of employees of the city's public utilities. The Court observed that under Springfield's charter there was no provision for separation of corporate activity involving utilities from work concerning other governmental functions. Hence, such matters could not become the subject of bargaining and contract between the board of public utilities and its employees.

The Court analyzed the act and explained its ruling in these words, 1.c. 41:

" . . . The act does not constitute a delegation or bargaining away to the union of the legislative power of the public body, and therefore does no violence to *City of Springfield v. Clouse, supra, 206 S.W.2d 1.*c. 543 [4], 545-6 [8, 9], because the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched. The public employer conditions of employees [**9] of the city's public utilities. The Court observed that under Springfield's charter there was no provision for separation of corporate activity involving utilities from work concerning other governmental functions. Hence, such matters could not become the subject of bargaining and contract between the board of public utilities and its employees.

The Court said, 1.c. 736:

". . . As we held in the Clouse case, § 29 Art. I, Constitution, does not confer any collective bargaining rights upon public officers or employees in their relations with municipal government and we hold that it is not applicable to the situation in this case because there is no such separation of the public utilities of the city from its general governmental functions and legislative powers as would be required to make it applicable. Therefore, our conclusion is that under the present charter of the city the whole matter of qualifications, tenure, compensation and working conditions in the city's public utilities involves the exercise of legislative powers and cannot become a matter of bargaining and contract."

Thereafter, the present Public Sector Labor Law was enacted. Its constitutionality and [**10] its effect were considered in *State ex rel. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969).* In ruling that the act is constitutional, the Court said, 1.c. 41:

"The general assembly is presumed to be aware of existing declarations of law by the supreme court when it enacts law on the same subject, *Mack Motor Truck Corp. v. Wolfe, Mo. App., 303 S.W.2d 697, 701* [5]; [*362] *Jacoby v. Missouri Valley Drainage Dist., 349 Mo. 818, 163 S.W.2d 930, 938* [8]; and, without indication to the contrary the general assembly must have had the intent to enact this legislation in accord with constitutional principles previously enunciated in City of Springfield v. Clouse, supra, and reiterated in *Glidewell v. Hughey, Mo., 314 S.W.2d 749.* For these reasons, it is constitutional." (Emphasis added).

The Court analyzed the act and explained its ruling in these words, 1.c. 41:

" . . . The act does not constitute a delegation or bargaining away to the union of the legislative power of the public body, and therefore does no violence to *City of Springfield v. Clouse, supra, 206 S.W.2d 1.*c. 543 [4], 545-6 [8, 9], because the prior discretion in the legislative [**11] body to adopt, modify or reject outright the results of the discussions is untouched. The public employer is not required to agree but is required only to 'meet, confer and discuss', a duty already enjoined upon such employer prior to the enactment of this legislation. City of Springfield v. Clouse, supra, 1.c. 542-3 [1-3]. The act provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached . . ." (Emphasis added).

The Public Sector Labor Law was interpreted again in *Curators of the University of Missouri v. Public Service Employees Local No. 45, 520 S.W.2d 54* (Mo. banc 1975). In that case the Curators, contending that said act was inapplicable to them, sought an injunction against defendant union and its striking members. The trial court enjoined the defendants from striking but held that the Public Sector Labor Law applies to the Board of Curators. The Board of Curators appealed from the latter ruling but this Court affirmed, holding that when said act is interpreted and applied against the background of Missouri constitutional provisions it does not [**12] represent an impermissible encroachment on the constitutional powers of the Curators to govern the state university pursuant to Mo. Const., art. IX, § 9(a). It

cited and discussed Clouse and Missey and then went on to say, l.c. 57-58:

"The question then becomes: what are the respective rights and responsibilities of the parties under the Missouri Public Sector Labor Law? The Law gives public employees the vehicle for petitioning their employer through a designated representative. When this representative submits proposals and grievances relative to salaries and other conditions of employment, the public body or its designated representative must acknowledge such proposals and grievances and must discuss them with the bargaining representative. Generally, the public body will designate a representative to meet with the representative of the employees. In this event, the public body's representative acts essentially as a hearer and a receptor of the employees' petitions and remonstrances. His duty is to discuss them with the bargaining representative, and to fully apprise himself of the nature and extent of the proposals and grievances presented. The representative of the [**13] public body must then transmit to it, in written form, the proposals and grievances and the substance of the discussions. The public body must then give them its consideration 'in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.

"We believe the requirements of the Public Sector Labor Law, as delineated above, merely provide a procedural vehicle for assertion by defendants of their constitutional rights to peaceably assemble and to petition for redress of grievances. In these circumstances, we hold that they do not encroach upon the power of the board of curators to govern the State University." (Emphasis added).

Plaintiffs, and amicus curiae which have filed briefs in support of plaintiffs' position, contend that the last sentence of § 105.520, while authorizing the public body to reject or modify a bargaining representative's proposal, also authorized a binding agreement between the public body and its employees [*363] when it authorizes adoption of the proposal by "ordinance, resolution, bill or other form required for adoption . . ." Therefore, they say, when the Moberly City Council, a legislative body, decided [**14] to and did adopt by ordinance the proposals submitted, it thereby entered into a binding and enforceable collective bargaining agreement.

These contentions misinterpret § 105.520. In the first place the statutory authorization to reject, modify and adopt the representative's proposal is not limited to action by a legislative body. It also authorizes action by an "administrative . . . or other governing body." Clearly, the decision in Clouse says that an administrative body cannot decide to and then enter into a collective bargaining agreement. Such action would violate applicable constitutional restrictions regarding separation of powers. It seems clear, therefore, that the General Assembly was saying in § 105.520 only that when a proposal is submitted to a public body (whether it be an administrative, legislative or other governing body), it has a duty to consider and act on such proposal. It may reject, modify or adopt. If it decides to adopt the proposal, it does so by ordinance, resolution or other appropriate form, depending on the nature of the public body. The result will be an administrative rule, an ordinance, a resolution, or something else which governs wages and [**15] working conditions, but it will not be a binding collective bargaining contract. n4 We cannot conclude that the legislature, by the provisions of § 105.520, intended to authorize and provide for a contract if the public body is a legislative body, but something less if it is an administrative board or other governing body. If the legislature had intended by the last sentence of § 105.520 to provide for and authorize a binding contract under some but not all circumstances mentioned in the statute, it would have so stated. Secondly, § 105.520 says nothing whatsoever about a public body entering into or executing a contract if it decides to adopt the representative's proposal. Therefore, we hold that § 105.520 did not authorize the Moberly City Council to enter into a collective bargaining contract.

n4 Judge Seiler's dissent suggests that by this language the Court in holding that the ordinance adopted by the City Council has no binding effect. That is not what we hold. The ordinance, just as any city ordinance, governs and is binding until changed by appropriate action. We hold only that this ordinance did not result in a collective bargaining contract and could be changed only with union approval.

[**16]

The above conclusions are in harmony with what this Court said in Missey and Curators in construing the Public Sector Labor Law. Both found that act to be a "meet, confer and discuss" law which merely provided a specific procedure whereby public employees could implement their constitutional rights to meet, talk and petition and which also assured that the public body would consider and take action of some kind (reject, modify or adopt) on the proposals. Both cases held that the statute was consistent with what the Court has held in Clouse and hence was constitutional. That the Court concluded that the act went no further is shown by this language in *Curators, 520 S.W.2d, l.c.* 58:

"The general assembly of Missouri may see fit in the

future to amend the Public Sector Labor Law and to extend its requirements beyond the boundaries set in Clouse, supra. If so, and an attack on the constitutional aspects of the Clouse holding is made, we will consider the questions at that time. We need not and should not, attempt to resolve them now."

This clearly indicates that the Court did not consider that the Public Sector Labor Law as then drafted provided for or [**17] authorized binding collective bargaining agreements for public employees. That would have been beyond the boundaries expressed in Clouse and would have called for the Court to then consider that which it postponed until such time as the statute might be amended to go beyond the boundaries of Clouse.

There has been no change in the Public Sector Labor Law since Missey and Curators [*364] and no change in the constitutional provisions considered in Clouse. Hence, the trial court was correct in sustaining the city's motion to dismiss.

Judgment affirmed.

Rendlen, C.J., Welliver, Higgins and Gunn, JJ, concur;

Seiler, Sr. J., dissents in separate dissenting opinion filed;

Donnelly, J., dissents in separate dissenting opinion filed.

[*366contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

ON MOTION FOR REHEARING

PER CURIAM

In their motion for rehearing or for clarification, plaintiffs and certain amicus curiae suggest that the court's opinion holds that an official in the executive branch of government can [**18] nullify a valid legislative enactment.

Plaintiffs misinterpret our opinion which clearly states that the ordinance enacted by the City Council of Moberly was a valid ordinance which was binding until changed by appropriate action by the City. The opinion goes on to recite that the City asserted that the mayor and city council had approved those changes which the city manager notified the firefighters would be made. This assertion by the City was not denied or contested in any way by plaintiffs. At no point in the record or in the briefs did plaintiffs contend that we were dealing with an attempt by someone in the executive branch to negate a valid legislative enactment and that what occurred was ineffective for that reason. At no time did the plaintiffs assert that the city council (with the Mayor's approval) had not acted on and approved the change in the duty schedule and the training program. Therefore, the court's decision was based on the premise that there was appropriate legislative approval of the changes of which the firefighters were notified. The opinion does not hold otherwise.

In other respects, plaintiff's motion is reargument of matters previously asserted. [**19]

The motion for rehearing is overruled.

DISSENTBY: SEILER; DONNELLY

DISSENT: [*364contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

The principal opinion concludes that when a proposal is submitted pursuant to § 105.520, the public body (here a municipality) has a duty to consider and act on such proposal -- to reject, modify or adopt. These are the choices. The principal opinion states the results "will be . . . an ordinance . . . , or something else which governs wages and working conditions . . ." How a proposal can be adopted by ordinance which "governs" wages and working conditions and yet has no binding effect is a new and puzzling concept in the law of contracts. All the negotiations which preceded the proposal, the proposal itself, and its adoption all become an exercise in futility. I do not believe the legislature intended such a meaningless outcome of the written instrument which § 105.520 permits to be presented to the governing body for adoption, once it has been adopted, as was done in this case.

I, therefore, respectfully [**20] dissent and agree with the court of appeals, western district, that the agreement is binding and enforceable and adopt portions of the western district opinion by Turnage, J., which, without use of quotation marks, states as follows:

The City maintains that under *City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539* (banc 1947) the City retains the legislative discretion to fix the hours and other conditions of employment of its employees and it may not enter into any contract which in any way infringes upon the total freedom which the City has to set the terms of employment of its employees. The City further argues that the court in *State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 41*[6, 7] (Mo. 1969),

stated that §§ 105.500 to 105.530 are in accord with the constitutional principles previously enumerated in Clouse. The City draws the conclusion that the court in Missey held that a city cannot enter into a binding agreement under § 105.520.

The City's arguments are not persuasive. The statement in Missey which the City relies upon was referring to the constitutional rights enjoyed by public employees to peaceably organize and assemble for any proper [**21] purpose, to speak freely, and to present their views and desires to any public officer or legislative body. The court did not hold in Missey that an agreement made under § 105.520 could not be enforced against the City. On the contrary, the court in Missey, at page 41[6, 7] held §§ 105.500 to 105.530 to be constitutional. The court also answered the argument the City now makes that Clouse prevents the agreement from being binding on the City when it stated at page 41[2-5]:

"The act does not constitute a delegation or bargaining away to the union of the legislative power of the public body, and therefore does no violence to *City of Springfield v. Clouse, supra, 206 S.W.2d 1.*c. 543[4], 545-6[9,9], because the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched. The public employer is not required to agree but is required only to 'meet, confer and discuss,' a duty already enjoined upon such employer prior to the enactment of this legislation. City of Springfield v. Clouse, supra, 1.c. 542-3[1-3]. The act provides only a procedure for communication between the organization selected [**22] by public employees and their employer without requiring adoption of any agreement reached."

The court reiterated its holding in Missey in *State ex rel. O'Leary v. Missouri State [*365] Bd. of Mediation, 509 S.W.2d 84* (Mo. banc 1974), when it quoted from Missey on pages 87 and 88. The court also stated at page 87 that §§ 105.500 to 105.530 had been found to be constitutional in Missey.

The only case which has been cited or located directly addressing the question raised in this matter is *Glendale City Employees Association, Inc. v. City of Glendale, 15 Cal.3d 328, 540 P.2d 609, 124 Cal. Rep. 513* (banc 1975). In Glendale the court stated at *124 Cal. Rep. at 517*[1] that the applicable California statute provided "that after negotiations 'If agreement is reached by the representatives of the public agency and a recognized employee organization . . . they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.'"

In holding that an agreement once approved by the public body becomes binding upon it, the court stated at *124 Cal. [**23] Rep. at 518:*

"Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement? The procedure established by the act would be meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless."

This court agrees and adopts the reasoning of the court in Glendale. While the language used in the California statute is slightly different in that it states the agreement shall be submitted to the governing body for determination, the statute involved here has the same meaning when it provides that the results of the discussion with the employees shall be presented to the governing body for adoption, modification or rejection. Thus, the meaning is the same, i.e., the agreement is to be presented to the governing body for its determination of whether or not it [**24] shall adopt, modify or reject the results of the discussions.

As cogently stated by the court in Glendale, there would be no point in providing for the results of the discussions between the public body and its employees to be submitted to the governing body if either party could disregard the provisions after they had been approved by both groups. Nor would there be any point in reducing the matters agreed upon to writing if there were to be no binding agreement. In fact, if the agreement is not to be binding upon either party, then the legislature has largely performed a useless act in passing §§ 105.500 to 105.530. Certainly, the submission of the results of the discussions to the governing body for its adoption, as provided in § 105.520, would be completely meaningless if it were held that after adoption the agreement thus made could be disregarded. The legislature clearly intended, as stated in both Missey and O'Leary, to reserve to the City the right to reject or modify the results of any discussions held with its city employees. By reserving this right to the City, the legislature protected the rights of the City as spelled out in Clouse. It is just as clear [**25] that the legislature, when it provided that the results of the discussions could be approved by the City, intended that the items thus approved by the City would become binding upon it, otherwise, as already stated, and as stated in Glendale, the provisions that these re-

sults could be approved by the City would be completely meaningless.

This Court holds that when the results of discussions which are held between the City and its employees have been submitted to a city council, the council is free to adopt, modify or reject the same. However, if the City elects to adopt the results of discussions which have been reduced to writing, governing salaries and other conditions of employment as authorized by § 105.510, then the agreement between the City and its employees becomes binding upon both [*366] parties. The agreement being binding, it then follows that such agreement may be enforced.

The petition in this case alleged an agreement between the City of Moberly and its firefighters which can be enforced. For that reason, the court erred when it dismissed the petition for failure to establish an enforceable contract binding upon the City.

In addition to what Judge Turnage [**26] stated above and the authorities cited by him, *Peters v. Board of Education of Reorg. Sch. Dist. No. 5, 506 S.W.2d 429 (Mo. 1974)*, supports the plaintiffs. In Peters the court upheld the validity of a written agreement between a teachers association and a school board which set up method for negotiating "revision of new policies" or "development of new policies". It provided for meetings of a joint negotiation committee composed of board representatives and association representatives and for appointment of a three member factfinding committee to attempt to resolve differences. The agreement provided that any tentative agreements would be submitted for ratification and if approved by both parties should become district policy. Plaintiffs, claiming to represent the association as a class, sought declaratory judgment that the written agreement was valid. The trial court dismissed the petition, but this court reversed and remanded. The effect of the decision is that once the parties reach an agreement it is binding.

I agree with the court of appeals that the judgment should be reversed and the cause remanded for further proceedings.

Robert E. Seiler, Senior Judge

DISSENTING [**27] OPINION

In their motion for rehearing, appellants suggest that "the Court, in holding that a municipality may not enter into a binding enforceable collective bargaining agreement, misstates the issue." I agree.

In my view, the opportunity presented on this appeal is one of accommodating, as much as possible, two concepts: (1) that there be full and meaningful communication between public employers and public employees so as to minimize strife and unrest and to maximize orderliness in the operation of Missouri government; and (2) that there can never be an analogy between public employees and private employees because of differences in the employment relationship arising out of the fact that the authority of a public body derives only from the consent of the people.

In practical effect, members of a city council are but trustees of the public -- they [*367] could not, if they would, pass an irrevocable ordinance when acting in the exercise of legislative discretion. No city council "could bind itself or its successor to make or continue any legislative act." *City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 545* (Mo. banc 1947). On the other hand, legislative [**28] acts of a council remain viable unless and until amended or repealed by the council; they cannot be rendered ineffectual by an administrative official.

In *Curators of the University of Missouri v. Public Service Employees Local No. 45, 520 S.W.2d 54, 57* (Mo. banc 1975), this Court observed:

The question then becomes: what are the respective rights and responsibilities of the parties under the Missouri Public Sector Labor Law? The Law gives public employees the vehicle for petitioning their employer through a designated representative. When this representative submits proposals and grievances relative to salaries and other conditions of employment, the public body or its designated representative must acknowledge such proposals and grievances and must discuss them with the bargaining representative. Generally, the public body will designate a representative to meet with the representative of the employees. In this event, the public body's representative acts essentially as a hearer and a receptor of the employees' petitions and remonstrances. His duty is to discuss them with the bargaining representative, and to fully apprise himself of the nature and extent of the proposals [**29] and grievances presented. The representative of the public body must then transmit to it, in written form, the proposals and grievances and the substance of the discussions. The public body must then give them its consideration "in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection."

In my view, the following should be added to the Curators observation, supra:

If the public body, as a result of such consideration, and in the exercise of its legislative discretion, adopts an ordinance affecting the employment relation between the public body and certain of its employees, the terms and

conditions of such ordinance shall govern and control such relation until modified or repealed by subsequent ordinance duly enacted by the public body.

In May 1980, the City Council of Moberly enacted an ordinance providing, in part, for the operation of its fire department. This ordinance was legislative in character, involved an exercise of the governmental power of the council and, therefore, can be amended or repealed. However, unless and until amended or repealed, its provisions should be honored.

I withdraw my concurrence and [**30] dissent.

Robert T. Donnelly, Judge

K

680 S.W.2d 944 printed in FULL format.

George H. Pace, et al., Respondents-Appellants, v. City of Hannibal, Missouri, a Municipal Corporation, Appellant-Respondent

No. 65725

Supreme Court of Missouri

680 S.W.2d 944; 1984 Mo. LEXIS 275

November 20, 1984

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Overruled December 18, 1984.

PRIOR HISTORY:

From the Circuit Court of Marion County

Civil Appeal

Judge E. Richard Webber

DISPOSITION: Affirmed in Part and Reversed in Part.

CORE TERMS: Hancock Amendment, franchise tax, license, gallons, municipal, charter, general revenue, levy, investor-owned, franchise, rollback, water, political subdivision, ordinance, use of public property, assume jurisdiction, rates charged, transferred, delegation, invalid, refund, elect, sewer, duty, question of jurisdiction, general interest, rate increase, charging, delegation of legislative power, legislative power

COUNSEL: J. Patrick Wheeler, Canton, Missouri, Attorney for Respondents Appellants; Rhonda C. Thomas, St. Louis, Missouri, Attorney for Appellant Respondent; Fredrich J. Cruse, Hannibal, Missouri, James J. Wilson, Edward J. Hanlon, St. Louis, Missouri, Attorneys for Amicus Curiae, City of St. Louis, William Patrick Cornan, Fayette, Missouri, Attorney for Missouri Municipal League, William H. Dahman, James W. Whitney, Jr., Terry Burnet, St. Louis, Missouri, Attorneys for City of Hermann, Robert B. Hoemeke, Peter T. Wendel, St. Louis, Missouri, Attorneys for Missouri Ass'n of Municipal Utilities, Richard S. Steinberg, St. Joseph, Missouri, Attorney for City of St. Joseph, John P. Brown, Columbia, Missouri, Attorney for City of Columbia, Karen E. Marty, Springfield, Missouri, Attorney for City of Springfield.

JUDGES: En Banc. Blackmar, J. Rendlen, C.J., Welliver, Higgins, Gunn, and Donnelly, JJ., concur. Billings, J., dissents in separate opinion filed.

OPINIONBY: BLACKMAR

OPINION: [*944] The basic question [**2] presented by this appeal is whether an increase in the gross amount of funds transferred by the Hannibal Board of Public Works to the general revenue fund of the City of Hannibal as a payment "in lieu of franchise tax" is violative of the so-called Hancock Amendment (Art. X, § 22(a) of the Missouri Constitution).

Since 1914 the City of Hannibal has provided certain utility services to its residents. [*945] The city currently owns and operates a water and sewer system and also distributes electricity. These utility systems are expressly authorized by statute. n1

n1 Section 91.450, RSMo 1978 was enacted in 1909 by section 9914, and authorizes cities of the third and fourth class and any city having a special charter to operate its own utilities.

In 1957 Hannibal adopted a charter, and is now a home rule constitutional charter city. See Art. VI, § 19 of the Missouri Constitution. Under Section 12.07 of the charter, the citizens of the city have vested the Hannibal Board of Public Works with "the exclusive [**3] power and duty to establish rates and provide for the assessment and collection of charges" for municipally operated utilities. n2 The board is composed of citizens appointed by the City Council for staggered terms. The record does not demonstrate any guiding standards for the establishment of rates, and, as a municipal utility operation, the board is not subject to the supervision of the Missouri Public Service Commission.

n2 We are not informed in the record as to the

authority for establishing rates prior to 1957.

The board, from the inception of the utility operation, has paid annually a percentage of its gross receipts into the general revenue fund of the city. These payments are said to be made "in lieu of a franchise tax," such as is ordinarily levied upon investor-owned utilities. n3 Our attention has not been directed to anything in the charter, statutes or ordinances which mandates such payments by the board. So far as the record shows, the payments are voluntary on the part of the board, and the board [**4] could reduce or eliminate them if so disposed. Since 1963 the payments in lieu of franchise tax have been established at 5 1/2 percent of gross revenues from the utility operation.

n3 Natural gas is provided for the residents of Hannibal by an investor-owned utility. It is required to pay a franchise tax to the city which is calculated on the basis of gross revenues. Many publicly-owned utilities do transfer some revenue to the taxing bodies in what is called a "payment in lieu of taxes". See Hall, Are Rates Charged by Government-Owned Utilities Too Low?, 112 Public Utilities Fortnightly 37, 38 (August 4, 1983).

This litigation is the result of an increase in the rates for water and sewer services decreed by the board in 1981. n4 Application of the 5 1/2 percent factor to the increased utility revenues created a net increase in the amount transferred into the general revenue fund of the city of Hannibal. n5 The plaintiffs, on behalf of a class composed of the utility ratepayers of the City of Hannibal, [**5] allege that the 5 1/2 percent factor must be reduced in proportion to the increase in rates, so that the city does not derive additional revenue by reason of the increased rates.

n4 Effective July 1, 1981, the charges for water and sewer services were increased as follows:

WATER
-- from $.99 to $1.24 per one thousand gallons for the first 5,000 gallons.
-- from $.84 to $1.09 per one thousand gallons for the next 20,000 gallons.
-- from $.59 to $.84 per one thousand gallons for the next 25,000 gallons.
-- from $.51 to $.76 per one thousand gallons for the next 1,450,000 gallons.
-- from $.46 to $.71 per one thousand gallons for any gallons over such amount.
Additionally, the minimum charge was increased from $2.00 to $3.00 per month.
SEWER
-- from one half of the water bill per month to $.98 per one thousand gallons of water used plus a minimum charge of $.95 per month.

n5 For fiscal year 1982, the first full year after the utility rate increases, a net increase of $26,608.98 was transferred by the Board of Public Works to the general revenue of the City of Hannibal.

[**6]

It should be emphasized that the propriety of the rate increase is not placed in issue. It is specifically not asserted that the board lacked the authority to order an increase in utility rates, or that the increase required a vote of the electorate under the terms of the Hancock Amendment. n6 Nor do the plaintiffs challenge the [*946] authority of the board to make payments to the city in lieu of franchise taxes.

n6 We do not decide whether the Board of Public Utilities is a "political subdivision" within the meaning of Art. X, § 22(a) of the Missouri Constitution.

The petition asserted four claims, as follows: (1) that no statute, ordinance or charter provision established adequate guiding standards for the setting of utility rates by the board; (2) that the board, under the provisions of the Hancock Amendment, n7 had the duty of reducing the percentage factor for the payment in lieu of franchise taxes in proportion to the increase of rates; (3) that the ratepayers were entitled to a refund, on account [**7] of the rollback provision as described in point (2); and (4) that the plaintiffs were entitled to attorneys' fees in accordance with the provisions of the Hancock Amendment.

n7 Section 22(a) of the Hancock Amendment, later quoted in full, requires a rollback in certain instances.

The trial court sustained contentions (2) and (4) of the plaintiff's petition, holding that the board was required to reduce the 5 1/2 percentage factor, and awarding attorneys' fees. It denied the claim for refund as set forth in contention (3), on the ground that there was no express authority for ordering a refund as prayed, and also rejected contention (1) finding that there was no unlawful delegation of legislative authority. Both parties have ap-

pealed from the portions of the decree adverse to them. The plaintiffs also ask for an additional allowance of attorneys fees on appeal.

We are met at the outset with a question of jurisdiction. The essential test is whether the validity of the amendment is challenged, n8 and such is not [**8] the case here. The jurisdictional provisions of the Hancock Amendment n9 are not appropriate either, because the state is not involved in this case. Nor is the Hancock Amendment a "revenue law" in the constitutional sense. Inasmuch, however, as the point is fairly arguable, and the parties have come here in good faith to brief and argue the case, we elect to assume jurisdiction. n10

n8 Art. V, § 3 of the Missouri Constitution.

n9 Art. X, § 23 of the Missouri Constitution.

n10 See *Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 196* (Mo. banc 1972) where this Court said, "by reason of the general interest and importance of the other questions in the case and need for adjudication at this level, that we will retain and decide the case, rather than go through the time-consuming procedure of sending the case to the Court of Appeals and then transferring it back prior to opinion."

Having considered the case, we conclude that the grant of authority to fix utility rates is not invalid as an improper [**9] delegation of legislative power, and affirm the judgment of the trial court on plaintiffs' contention (1). We conclude that the Hancock Amendment does not require a rollback, and therefore reverse the decree of the trial court on contention (2). Since we find no violation of the provisions of the Hancock Amendment, plaintiffs' contentions (3) and (4) fall out of the case.

1. Invalid Delegation of Legislative Power

It is the plaintiffs' contention that the blanket authority vested in the board to fix utility rates n11 constitutes an invalid delegation of legislative power. Although plaintiffs cite several cases about unlawful delegation of legislative power, none is a utility case. No authority has been cited which supports the claim made here nor do the plaintiffs question the reasonableness of the rates set by the board in 1981.

n11 Section 12.07 of the Hannibal City Charter vests the Board of Public Works with "the exclusive power and duty to establish rates and provide for the assessment and collection of charges" for city operated utilities.

[**10]

Moreover, the purpose in making this argument is difficult to perceive. The claim, carried to its logical extreme, would invalidate the entire utility system, for utilities cannot operate without charging their patrons for the services furnished. The authority to operate a municipal utility connotes the authority to operate it on a sound basis. *Oswald v. City of Blue Springs, 635 S.W.2d 332, 333-34* (Mo. banc 1982). Were this not so, the utilities would either cease to operate or else they would constitute a permanent drain on the city treasury and on taxpayers in general. Such obviously [*947] was not the intention of the legislature in authorizing municipal utilities. It should not be difficult to determine how much the utilities must charge in order to maintain their operations on a sound basis and to provide for reasonable returns.

The plaintiffs argue that there must be some restraints on the power of the board to prescribe rates, because rates for municipal utilities, in contrast to those of investor-owned utilities, are not subject to regulation by the Missouri Public Service Commission. The argument is not persuasive because there is a vital distinction between [**11] municipal utilities and investor-owned utilities. n12 The latter have as their ultimate purpose the realization of a profit for the shareholders. The legislature, in its wisdom, might well have concluded that investor-owned utilities, endowed with natural monopoly, should not be allowed complete discretion as to rates charged, because they would be tempted to maximize profits free from competitive inhibition. The legislature might also conclude that normal political pressures would be sufficient to keep rates of municipal utilities in line. n13 There is no particular motive for turning a profit. We need not speculate as to whether some sort of lawsuit might be filed to prevent a municipality from charging unreasonable rates for utility service. No such claim has been presented here.

n12 This distinction is highlighted in Hall, supra note 3.

n13 In addition, the rates charged by government-owned utilities are generally lower than those charged by privately-owned utilities. Thus, one of the main reasons for government regulation of private utilities -- to keep rates reasonable -- does not exist for municipal utility operations. For a good economic explanation of why those rates are lower see Hall, supra note 3.

[**12]

The claim of unlawful delegation of legislative power, for whatever purpose advanced, is not meritorious. The trial judge did not err in refusing the relief sought.

2. Hancock Amendment

The trial court upheld the plaintiffs' assertion that there was a violation of Art. X, § 22(a) of the Missouri Constitution, finding that the payments in lieu of franchise tax came within the language "tax, license, or fees." The pertinent provisions are as follows:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated [**13] gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

The plaintiffs place strong reliance on *Roberts v. McNary, 636 S.W.2d 332* (Mo. banc 1982), for the proposition that the in lieu of franchise tax payment is a tax within the meaning of Art. X, § 22(a) because it is paid into the general revenue fund of the city. Roberts specifically involved fees charged by St. Louis County for "numerous county services, such as parks and building inspection." This case held that all charges to the public for governmental services were within the provisions of the amendment, whether or not paid into a [*948] general revenue fund, and could not be increased without a vote of the [**14] people. We found that this conclusion flowed from the plain language of the amendment. Citing dictionary definitions of "tax" "license" and "fee", the Court declined to narrow these words so as to apply only to those levies which seek to raise general revenue.

The Hancock Amendment requires voter approval for increases in taxes, licenses or fees, with the purpose of reining increases in governmental revenue and expenditures. *Roberts, supra at 336, Buchanan v. Kirkpatrick, 615 S.W.2d 6, 14* (Mo. banc 1981). So far as this record shows the payments in lieu of franchise tax were not imposed by statute, charter or ordinance, but represented voluntary payments by the board into the city's general revenue fund. There is no similarity to the user fees considered in Roberts because the 5 1/2 percent factor is not charged against the users. They pay the increased rates, to which the percentage factor is then applied. Thus the application of a preexisting 5 1/2 percent factor to the rate increase simply does not amount to the imposition of a "tax, license or fee" in the sense of Art. X, § 22(a). To hold that the payments in lieu of franchise tax are covered by the Hancock Amendment [**15] would enlarge upon its plain language, contrary to the teaching of *Roberts v. McNary, supra.*

We do not understand the plaintiffs to claim that they should be entitled to partial relief on the ground that the payments in lieu of franchise taxes were invalid. The plaintiffs concede that if a franchise tax were levied against a private utility, based on a percentage of gross receipts, and if the utility's rates were then lawfully increased, the Hancock Amendment would not require a rollback. They likewise concede that the rate of a municipal sales tax would not have to be adjusted simply because the tax were found to generate more revenue than in past years.

The purpose which appears in the whole plan of utility operations is to place municipal utilities on the same basis as investor-owned utilities. A public utility, whether investor or publicly owned, requires a franchise to operate. Franchises, in addition to awarding monopoly, also regularly permit the use of public property, including streets, for the location, maintenance and repair of the utility's distribution facilities. A franchise tax is designed, in part at least, to repay the municipality for inconvenience and expense [**16] attending the use of public property. n14 It is fairly inferable that the payments made by the Hannibal Board of Public Utilities were designed to make similar compensation to the city. Were it not for the payments in lieu of franchise tax it would be appropriate for the city to levy a charge against the Board of Public Utilities for the fair value of the use of public property, including provision for maintenance and repair on account of wear, tear and damage attributable to the utility.

n14 See Hall, supra, note 3.

Inasmuch as the payments do not fall within the com-

pass of "tax, license or fees," there is no ground for applying the "rollback" provisions triggered by a broadening of the base for a "tax, license, or fees." Here too the language of the amendment simply does not fit the facts before us.

There is absolutely no showing that the basic rate increase was occasioned by anything other than a good faith determination by the board that the increase was necessary to a sound operation. The utility [**17] operation, the setting of rates by the board, and the payments in lieu of franchise tax, are all long established and should not be lightly disturbed. We need not speculate further except to say that the situation shown by this record simply does not fit Art. X, § 22(a) of the Missouri Constitution.

The judgment finding violation of Art. X, § 22(a) is reversed. This reversal destroys the basis for fees and so that portion of the judgment allowing fees is likewise reversed. The balance of the judgment is affirmed.

[*949] Rendlen, C.J., Welliver, Higgins, Gunn, and Donnelly, JJ., concur;

Billings, J., dissents in separate opinion filed.

DISSENTBY: BILLINGS

DISSENT: BILLINGS, J.

The principal opinion squarely recognizes there is a "question of jurisdiction" for this Court to entertain this appeal under Art. V, § 3, of the Missouri Constitution, but, nevertheless, concludes that because "the parties have come here in good faith to brief and argue the case, we elect to assume jurisdiction", relying upon *Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193* (Mo. banc 1972).

The jurisdiction of this Court is carefully delineated to certain specifically described classes of cases and [**18] the instant appeal falls beyond the narrow scope of our jurisdiction as found in the Constitution. Consequently, jurisdiction of this appeal is in the court of appeals and we should not, under the guise of the "general interest and importance" rubric found in Foremost-McKesson, reach out to take or elect to assume jurisdiction of appeals which the Constitution directs elsewhere. To do so, in my view, flies in the face of the clear provisions of the Constitution we are charged with following. The fact that we are the court of last resort does not and should not give us that license.

I would transfer the appeal to the court of appeals as provided by Art. V, § 11, Mo. Const.

WILLIAM H. BILLINGS, Judge

MISSOURI REVISED STATUTES

TITLE VII. CITIES, TOWNS AND VILLAGES
CHAPTER 91. MUNICIPALLY OWNED UTILITIES
THIRD AND FOURTH CLASS CITIES, TOWNS AND VILLAGES AND SPECIAL CHARTER CITIES OF LESS THAN 30,000

§ 91.450 R.S.Mo. (1999)

§ 91.450. Certain cities may own public utilities--how acquired--board of public works

Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have less than thirty thousand inhabitants, shall have power to erect or to acquire, by purchase or otherwise, maintain and operate, waterworks, gas works, electric light and power plant, steam heating plant, or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system, public auditorium or convention hall, which are hereby declared public utilities, and such cities, towns or villages are hereby authorized and empowered to provide for the erection or extension of the same by the issue of bonds therefor, and any city, town or village which may own, maintain or operate, and which may hereafter acquire, by purchase or otherwise, and operate, or which may engage in the construction of any of the plants, systems or works mentioned in this section, is hereby authorized and empowered to establish, by ordinance, within such city, town or village, an executive department to be known as "The Board of Public Works", to consist of four persons, electors of said city, town or village, who have resided therein for a period of two years next before their appointment, who shall be appointed by the mayor of such city, town or village, and confirmed by the common council in such manner as other appointive officers of such city, town or village are appointed and confirmed. The members of such board shall hold office for a term of four years each, or until their successors are appointed and qualified; provided, that the members of said board shall hold office for a term of four years each, except the first incumbents, as members of said board of public works, who shall be appointed and hold office for the term of one, two, three and four years respectively.

M

715 S.W.2d 482 printed in FULL format.

LOVE 1979 PARTNERS, FIRST PLAZA REDEVELOPMENT CORPORATION, et al., Respondents, v. PUBLIC SERVICE COMMISSION OF MISSOURI, Appellant, and STATE ex rel. GERALD A. RIMMEL, etc., Relator-Respondent v. PUBLIC SERVICE COMMISSION OF MISSOURI, Defendant-Respondent, and UNION ELECTRIC CO., et al., Intervenors-Respondents-Appellants

No. 67404

Supreme Court of Missouri

715 S.W.2d 482; 1986 Mo. LEXIS 297

July 15, 1986, Filed

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Overruled September 16, 1986. Transfer Denied.

PRIOR HISTORY:

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

The Honorable Byron L. Kinder, Judge

CORE TERMS: steam, users, bi-state, plant, customer, acquire, loop, heating, public interest, acquisition, energy, substantial evidence, conversion, regulated, oil-fired, effective, invalid, regulation, township, helpful, implied power, new plant, refuse-to-steam, subsidiary, electrical, contractor, construct, compact, waste, lease

JUDGES: En Banc. Blackmar,. Higgins, C.J., Billings, Donnelly, Robertson and Rendlen, JJ., concur. Welliver, J., dissents in separate opinion filed.

OPINIONBY: BLACKMAR

OPINION: [*484]

The Honorable Byron L. Kinder, Judge

This case involves an ambitious program for using refuse from the City of St. Louis in the generation of commercial steam. Because the program calls for the sale of some of the facilities of Union Electric Company (UE), a regulated electric company and heating company, the jurisdiction of the Missouri Public Service Commission was invoked. n1 The Commission, after an evidentiary hearing, granted the required approval. Certain steam users presently served by UE successfully challenged the Commission's order in the Circuit Court of Cole County, which set aside the order and remanded the case to the Commission for further proceedings. UE and the Commission appealed directly to this Court. We now reverse the decree of the circuit court and sustain the order of the Public Service Commission.

n1 The Commission can acquire jurisdiction over UE in two ways. First, as an electrical company UE is subject to § 393.190, RSMo Cum. Supp. 1984, which provides that an electrical company shall not sell "the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do." Alternatively, the operation of a steam system qualifies UE as a heating company under § 386.020, RSMo Cum. Supp. 1984. Section 393.290, RSMo 1978, makes applicable to heating companies the provisions of 393.190 relating to electrical companies with regard to proceedings before the commission.

[**2]

UE for many years had produced steam from oil-fired boilers at its Ashley plant, which it sold to customers in downtown St. Louis. Its rates were regulated by the Commission. The steam is distributed through a network of underground pipes known as the "steam loop." The steam operation has not produced an attractive return in recent years. There had been no rate increase since 1981. Some customers have switched to alternate heating methods, and UE has been interested in disposing of the operation.

Bi-State Development Agency (Bi-State) is a public agency established by interstate compact approved by the legislatures of Missouri and Illinois n2 and by the

Congress of the United States n3 as required by Art. I, Sec. 10, of the Constitution. It is governed by a Board of Commissioners appointed in equal numbers by the governors of each state and renders a variety of services in the Greater St. Louis metropolitan area. It has no taxing power but does have the authority to issue revenue bonds to finance [*485] its various projects and to accept contributions from agencies of government. n4

n2 Sections 70.370-70.440, RSMo 1949; Ill. Rev. Stat. Ch. 127, paras. 63r-1 -- 63r-4 (1949).
[**3]

n3 Bi-State Compact, Ch. 829, 64 Stat. 568 (1950).

n4 Section 70.370, Art. III (4) and (5), RSMo Cum. Supp. 1984.

For many years the City of St. Louis has had a problem in the disposal of refuse. It is under order from the Environmental Protection Agency to bring its present incineration operations to an end. Bi-State undertook an inquiry as to the feasibility of using the city's refuse in the production of steam to be distributed to the customers now served by UE's Ashley plant and steam loop. It made inquiries about available contractors and decided to negotiate with Thermal Resources of Ohio, Inc. which formed a wholly-owned subsidiary, Thermal Resources of St. Louis, Inc., (Thermal) for its prospective Missouri operations.

The program, set out in three interdependent contracts, called for (1) the sale of the steam loop by UE to Bi-State; (2) the sale of the Ashley Plant by UE to Thermal and its conversion of some oil-fired boilers to coal-firing; (3) the discontinuance of UE's steam distribution operation and its replacement by Bi-State as a supplier of steam to UE's customers; (4) [**4] the operation of the steam production and distribution facilities by Thermal in accordance with its contract with Bi-State (described as "Phase One"); (5) the temporary supply of electric power from the Ashley plant to UE until it could construct alternate facilities; and (6) the design and construction by Thermal of a refuse-to-steam plant (described as "Phase Two"). It is contemplated that the new plant will provide the normal quantities of steam required by the customers, but the Ashley plant will be retained for "peaking" supply and will be available during temporary shutdowns, as for repairs.

UE applied to the Public Service Commission for approval of the contracts for sale of the Ashley plant and the steam loop, and for authority to discontinue its operations as a regulated heating company. The Commission directed UE to notify its steam customers, some 18 of which sought and were granted leave to intervene. A group of these intervenors, representing only a small minority of the steam users, actively opposed the application before the Commission.

The objecting users assert legal arguments against the proposal essentially as follows: n5

n5 The respondents argue that any constitutional claims have been waived because they were not presented to the Public Service Commission. We believe that the essential bases of the challenge were clear at all stages of the proceeding, and therefore perceive no obstacle to the consideration of the merits.

[**5]

1. Section 70.373(2), RSMo Cum. Supp. 1984, which purports to confer upon Bi-State the power to acquire and operate facilities for the conversion of waste and refuse into energy, was "invalid" at the time the Commission acted because it had not at that time been consented to by Congress;

2. Section 70.373(2) does not authorize Bi-State to acquire and operate oil-fired or coal-fired facilities for the production of steam;

3. The Commission was in error in yielding up its jurisdiction over Thermal as a "heating company."

The users also argue that the proposals should not be approved because there is no assurance that a refuse-to-steam facility would ever be built, and that the entire program is not in the public interest because it is not feasible and economic. They subsume these arguments in a claim that the decision is not supported by substantial evidence.

The Commission, without dissent, rejected the users' arguments and granted the permission sought. It found that the proposed contracts were a part of an integrated plan and that the initial acquisitions were a first step in the plan. It concluded that the overall plan was not detrimental to the public interest and that the [**6] contracting parties were capable of carrying it out. It rejected the users' argument that the plan would produce an unreasonable increase in [*486] rates for steam, and held that the fact of an initial rate increase was not ground for disapproving the plan. It concluded that Thermal was exempt from it jurisdiction because it served only Bi-State, which was specifically excluded by statute from Commission jurisdiction by § 386.020(10), RSMo Cum. Supp. 1984. It also found that the transaction was authorized by the governing statute.

Following denial of their application for rehearing, the users sought review in accordance with § 386.510, RSMo 1978, in the Circuit Court of Cole County, which set aside the decision of the Commission. The court found that the users had properly presented and preserved all the legal issues ruled on, and that these issues had merit. It made no ruling on the other issues assigned by the users, presumably because the legal findings were adequate to support its conclusions.

UE, the Commission, Bi-State and Thermal have appealed. n6 We have initial appellate jurisdiction because the users have drawn the validity of § 70.373(2) into question by pointing [**7] to the absence of congressional approval at the time the Commission acted. n7 Mo. Const. Art. V, Sec. 3. It is helpful, at the outset, to comment on the scope of our review. There is no presumption in favor of the Commission's resolution of legal issues. Nor is there any presumption in favor of the circuit court's determination of these issues, over and above an appellant's normal burden of demonstrating error. So we decide the legal points anew. The decision of the Commission on factual issues, however, is presumed to be correct until the contrary is shown and we are obliged to sustain the Commission's order if it is supported by substantial evidence on the record as a whole. n8 The circuit court did not reach the factual issues, and so had no occasion to consider the users' challenge to the Commission's factual findings, but the users are entitled to maintain their factual challenges as additional reasons for sustaining the judgment of the circuit court.

n6 The users have moved to strike the appeals of Bi-State and Thermal on the ground that they did not participate in the Commission proceedings and therefore are not proper appellants under § 386.540, RSMo 1978. Each applied for leave to intervene while the case was pending in the circuit court. The users initially objected to the intervention but then withdrew their objections. Under this state of the record the motion should be, and is, overruled. The appeals of the Commission and UE are adequate to carry the entire case to this Court. The presence of Bi-State and Thermal as parties is helpful in binding them to the obligatory portions of the Commission's order. We need not decide what the situation would be if an intervenor who had not participated in Commission proceedings were the only party who sought to appeal.

[**8]

n7 In the Findings of Fact, Conclusions of Law, Order, and Judgment, Judge Kinder states that "because congressional consent was never obtained for the 1980 amendment to the Bi-State Compact . . . under which Bi-State seeks to acquire Union Electric's steam facility, said amendment is invalid." (Emphasis supplied).

n8 *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n., 585 S.W.2d 41, 47* (Mo. banc 1979); *State ex rel. Ashcroft v. Public Serv. Comm'n., 674 S.W.2d 660, 662 (Mo. App. 1984); State ex rel. Inman Freight System, Inc. v. Public Serv. Comm'n., 600 S.W.2d 650, 654 (Mo. App. 1980).* Section 386.510, RSMo 1978, calls for an inquiry by the court into the "reasonableness and lawfulness" of the Commission's order. The cited cases demonstrate that standard for review is essentially the same as cases decided by other administrative tribunals.

1. Legal issues.

a. The basic authority of Bi-State.

Art. I, Sec. 10, of the Constitution of the United States provides in pertinent part as follows:

No state shall, without the consent of [**9] Congress, . . . enter into any agreement or compact with another state . . . .

Section 70.373(2), was amended in 1980 to include language granting Bi-State the authority to operate refuse-to-energy facilities. An identical provision was adopted by the legislature of Illinois. n9 At the time the essential contracts were entered into, and at the time the Commission issued its order, Congress had not approved or consented [*487] to these amendments. That approval did not come until the adoption of SJR 127 on September 23, 1985. The users argue that the Commission's order is unauthorized by law because, at the time it was entered, § 70.373(2) was invalid for want of congressional consent.

n9 Section 70.373(2), RSMo Cum. Supp. 1984; Ill. Rev. Stat. Ch. 127, para. 63s-9 (1986).

We do not agree. We need not speculate as to what the situation would have been if congressional consent had not been forthcoming, or if one of the parties relying on the statutory section had changed its mind prior to the approval [**10] by Congress. We do not even need to consider the appellant's arguments: (1) that the contracts in issue affect only the state of Missouri and so do not depend on congressional approval, citing *Virginia v. Tennessee, 148 U.S. 503, 37 L. Ed. 537, 13 S. Ct. 728 (1893)* and *United States Steel Corp. v. Multistate Tax*

Commission, 434 U.S. 452, 54 L. Ed. 2d 682, 98 S. Ct. 799 (1978), and, (2) that Congress had given advance consent to interstate compacts relating to the conversion of refuse into energy, citing *Cuyler v. Adams, 449 U.S. 433, 66 L. Ed. 2d 641, 101 S. Ct. 703 (1981).* We hold that the subsequent congressional approval was effective to remove any existing infirmities and that § 70.373(2), in its present form, governs the transaction.

Ratification is familiar doctrine in various areas of the law. n10 The purpose of the compact portion of Art. I, Sec. 10, is to permit Congress to protect the sovereignty of the United States against dilution by concerted action among the states. It is clear from the Joint Resolution that Congress is now willing to see this transaction consummated. The parties initially concerned -- UE, Bi-State, Thermal, and the Public Service Commission, [**11] are now before the Court urging affirmance of the Commission's decision and reversal of the circuit court. The first three effectively bind themselves anew to the contracts and would be estopped to repudiate them. The users' interest in congressional approval is minimal. The Missouri legislature has given its approval, as has the Public Service Commission. If the Commission's order is otherwise sustainable, Art. I, Sec. 10, interposes no bar.

n10 See Restatement (Second) of Agency § 82 (1958); *Schmidt v. Morival Farms, Inc., 240 S.W.2d 952 (Mo. 1951)* (corporate law); *Corder v. Morgan Roofing Co., 355 Mo. 127, 195 S.W.2d 441, 446 (1946)* (insurance law); 75 C.J.S. Ratification, and Ratify (1952).

Our conclusion is consistent with *Bank of Washington v. McAuliffe, 676 S.W.2d 483* (Mo. banc 1984), which held that questions about whether "straw parties" acting on behalf of a bank holding company could act as incorporators of a new bank were no longer viable when the legislature, following incorporation, [**12] gave express authorization for them so to act.

The users, as a subsidiary argument, assert that the consent of Congress could not be effective prior to September 23, 1985, and that they should be entitled to refunds of the monies, representing the difference between old and new rates, which the circuit court ordered paid into its registry pending appeal. We do not agree. Ratification gives retroactive vitality to the acts ratified. n11 Retroactivity is especially appropriate here, because the joint resolution held expressly that the newly approved powers were to be effective as of January 1, 1983, which is before the applicable contracts were executed and before the date of the Commission's order. Congress has the authority to decide whether the additional powers of Bi-State are consistent with the national interest. It was aware of the specific transaction now before us. The users had no right to the maintenance of the existing rate structure. There was strong likelihood that the rates would have been increased even if UE had remained the owner of the steam facilities. The users have not shown that they are entitled to a refund of any part of the impounded funds.

n11 Restatement (Second) of Agency § 82, comment c, at 210-211 (1958); *Wilks v. Stone, 339 S.W.2d 590, 595 (Mo. App. 1960); Ireland v. Shukert, 238 Mo. App. 78, 177 S.W.2d 10, 14 (1944).*

[**13]

The users raise the spectre of retroactive legislation. The only retroactivity is that [*488] of Congressional approval, and this does not deprive them of any vested right. The appropriate Missouri authorities, legislative and administrative, have given their effective approval. No supervening rights of the users have been violated.

b. The authority of Bi-State to operate the present steam facilities.

Section 70.373(2) with significant provisions underscored, reads as follows:

To acquire by gift, purchase or lease; to plan, construct, operate, maintain, or lease to or contract with others for operation and maintenance; or lease, sell or otherwise dispose of to any person, firm or corporation, subject to such mortgage, pledge or other security arrangements that the bi-state development agency may require, facilities for the receiving, transferring, sorting, processing, treatment, storage, recovery and disposal of refuse or waste, and facilities for the production, conversion, recovery, storage, use or use and sale of refuse or waste derived resources, fuel or energy and industrial parks adjacent to and necessary and convenient thereto;

The users observe [**14] that Bi-State is not now equipped to produce steam from refuse and that it proposes to operate the present facilities for the foreseeable future, generating steam from an oil-fired or coal-fired generating plant. They argue that, whatever the authority to operate a refuse-to-steam facility might be, Bi-State has no express or implied authority to operate the present facilities.

The Commission found that the contracts for which Commission approval was sought envision a comprehensive plan, looking to the construction of the refuse-fired

facilities. Acquisition and operation of the steam loop and the Ashley plant are necessary initial steps pending construction of the refuse-treatment plant. The evidence shows that it would not be practicable to build the new plant first and then search for steam customers. There is also support for the assertion that quick action is necessary to avoid obsolescence of the steam loop and further loss of customers. The Commission's conclusions as to practicability and necessity are essentially factual findings, which we find to be supported by the record.

Given the factual findings as just described, we conclude that Bi-State has the authority to acquire [**15] the steam loop and to furnish steam to customers, as an implied power necessary to the exercise of the express powers conferred by § 70.373(2). Bi-State also has the implied power to continue the use of the Ashley plant as a peaking or auxiliary facility, following the construction of the new plant. The power to build and to operate the refuse-treatment plant connotes the power to do what is necessary to make the program practical and economic. The legislatures and Congress surely did not intend to confer power, only to see it frustrated by a grudging construction of the governing authority.

The users argue that the powers of public agencies should be strictly construed. Much authority supports this abstract proposition, but more recent cases accord a degree of flexibility, looking to the broad purpose rather than dwelling on minute details. *Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208* (Mo. banc 1986). A public body should not be allowed to extend its powers, but should be allowed substantial discretion in the exercise of its conferred powers.

The users observe, however, that there is no obligation on Thermal to complete the construction of the refuse-consuming [**16] plant, and no guarantee that that plant will ever be built. They construct a scenario in which Thermal abandons the project and Bi-State is unable to find another contractor. Under this scenario Bi-State might continue to operate the steam loop with steam produced by the Ashley plant, for the foreseeable future.

The bare possibility that events might unfold in this manner furnishes no reason for rejecting the proposal at its inception. Bi-State is a public body, subject to control of the public authorities. There is no indication [*489] that it is not proceeding in the best of faith in the sincere desire to consummate a refuse-to-energy project. It has the authority to oust Thermal, to acquire the Ashley plant itself, and to employ another contractor, if Thermal does not proceed with dispatch and perform to its satisfaction. The basic plan looks many years into the future. A present contract which covers all details of the program might not be the contract most conducive to the public interest, for present obligation might have a high price. The proposed program is not rendered invalid simply because the precise timing is uncertain and risks are involved.

Both parties cite [**17] *Reilly v. Sugar Creek Township of Harrison County, 345 Mo. 1248, 139 S.W.2d 525 (1940)*, which holds that a township having the power to build roads has the implied power to acquire rights of way, by reimbursing other public authorities for condemnation damages paid in acquisition. The case is more helpful to the appellants than to the users. There is no suggestion that the township had to have all road construction contracts in place before it proceeded with the acquisition of rights-of-way. Public bodies, indeed, may engage in extensive planning expense and acquisition costs without binding themselves to complete the improvements, and have the authority to abandon projects for which authority has been granted and bonds voted. It is safe to say that few public involvements would be completed if all contracts had to be in effect before the first spade was turned.

c. PSC jurisdiction over Thermal.

The users claim error in the Public Service Commission's yielding up its authority over steam from the Ashley plant by permitting UE to sell the plant to Thermal, and by concluding that Thermal is not a "heating company" subject to its jurisdiction.

Under the contract arrangement, [**18] however, Thermal will supply steam only under contract with Bi-State, which is exempt from regulation. n12 The Commission properly concluded that Thermal is involved in the transaction only as the instrumentality chosen by Bi-State to carry out its powers. Bi-State, rather than Thermal, has the ultimate responsibility for serving the customer. The rates are established by contracts between Bi-State and Thermal. Bi-State's exemption insulates Thermal from regulation by the Commission. Thermal does not hold itself out as available to, and is not bound to, serve the public. Cf. *State ex rel. M. O. Danciger & Co. v. Public Service Commission, 275 Mo. 483, 205 S.W. 36 (1918); State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown, 323 Mo. 818, 19 S.W.2d 1048 (1929).*

n12 See 386.020(10), RSMo Cum. Supp. 1984.

The users have no statutory right to steam service from a utility subject to Commission regulation. The legislature, in it wisdom, has given the Commission jurisdiction only over investor-owned [**19] utilities, and

has specifically exempted public agencies of Bi-State's type. The fear, apparently, was that profit-making utilities might make use of their naturally monopolistic situation to extract exorbitant profits for their owners. The Commission does not regulate rates of municipally-owned utilities and rural cooperative associations. See *Pace v. City of Hannibal, 680 S.W.2d 944* (Mo. banc 1984). Public agencies have no motive for seeking profits and political pressures arguably exert downward pressure on rates. Whether or not we agree with the legislature's concept of the public interest, as evidenced by its regulatory program, is beside the point.

2. Factual Arguments.

The users argue, finally, that the Commission's decision is "not supported by competent and substantial evidence."

It is initially suggested that the Commission applied the wrong standard of review. The users insist that the applicants have the burden of showing that the sale of the utilities' assets is in the public interest and that the proposed purchaser of the assets [*490] is capable of assuming the utility's role in providing service.

The Commission's decision and order shows that concern [**20] for the public interest was predominant in its deliberations. It considered not only the interest of its customers, but the interest of the St. Louis metropolitan area in solving its refuse problems. The thought of using refuse to produce worthwhile energy is certainly appealing. The Commission is justified in looking at the broad picture.

The users say that the Commission inadequately analyzed the financial capability of Thermal Resources of St. Louis, Inc., which is a corporation newly formed for the specific project at hand. Thermal Resources of Ohio, the parent corporation, however has guaranteed performance by its subsidiary. The question whether the Thermal complex has the technical capacity to carry through on the project is preeminently the kind of question which ought to be directed to the Commission.

The final suggestion is that the governing contracts will subject steam customers to unreasonable rate increases. As we have said earlier, the customers are not entitled to a guarantee of the status quo in the furnishing of steam. The Commission could conclude that the present facilities are obsolescent and uneconomic, and that rate increases would be anticipated even if UE [**21] were to continue the operation. It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. The users complain of a "ratchet" effect, in which the new rates may go up but not down. The Commission might well conclude, however, that the new level had to be guaranteed in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.

This case is very different from one in which we review a civil judgment for damages, to make sure that each element is supported by substantial evidence. The problems presented to the Commission involve subjective evaluations of economic factors. There is no sure method for predicting whether a project will succeed. Questions of analysis and judgment are committed by law to the decision of the Commission, which has the assistance of a technically trained staff and is better equipped to make decisions of this kind than we are. The users are asking us to [**22] substitute our judgment for its judgment. We decline to do this because we are persuaded that the Commission's decision is a permissible one under the record. There are times when the courts must step in to protect the public against arbitrary or unauthorized administrative action, but the users do not persuade us that such intervention is necessary or proper in this case.

The judgment of the circuit court is reversed and the case is remanded with directions to sustain the order of the Commission.

Higgins, C.J., Billings, Donnelly,

Robertson and Rendlen, JJ., concur;

Welliver, J., dissents in separate opinion filed.

DISSENTBY: WELLIVER

DISSENT: WELLIVER

I respectfully dissent.

If our Public Service Commission is powerless to control the sale of assets of regulated utilities, it is in fact virtually powerless to regulate utilities in this era of sales and mergers. Our holding today is an open invitation for manipulated sales and mergers. I would affirm the circuit court.